IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J. A., SEHEL, J.A, And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 225 OF 2019

JOSEPH STEVEN GWAZA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Masabo, J.)

dated the 22nd day of May, 2019
in
Misc. Criminal Application No. 241 of 2018

.....

JUDGMENT OF THE COURT

18th August & 7th September, 2021

MWARIJA, J.A.:

The appellant, Joseph Steven Gwaza was charged in the Resident Magistrate's Court of Dar es Salaam at Kisutu (Kisutu Resident Magistrate's Court) with the offence of trafficking in narcotic drugs contrary to s. 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap. 95 R.E. 2002] (the Act). It was alleged that on 14/9/2009 at Mwalimu Julius Kambarage Nyerere International Airport within Ilala District in Dar es Salaam Region, the appellant was found trafficking 536.7 grams of cocaine valued at TZS 13,419,000.00. He was later on 6/5/2015 committed for trial by the High Court

in terms of s. 246 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA). He was consequently arraigned in Criminal Sessions Case No. 45 of 2015 which was until the material time of filing this appeal, pending in that court.

The charge which the appellant faces is the second one after having been previously charged in Criminal Case No. 909 of 2009 with the same offence based on the same facts. In that case, after his committed for trial by the High Court, the trial proceeded to its conclusion on 4/3/2015 whereupon judgment was scheduled to be pronounced on notice. On 26/3/2015 however, before the judgment could he handed down, the Director of Public Prosecutions entered *nolle prosecui* under s. 91 (1) of the CPA. Although the appellant was, as a consequence, discharged, he was charged afresh with the same offence and later committed for trial by the High Court as shown above. Because of the nature of the offence and the section of the law under which the appellant was charged, he could not be released on bail. He had all along been remanded in custody pending his trial.

Dissatisfied with his continued stay in prison, on 10/12/2018 he filed an application in the High Court seeking to be granted bail pending his trial. He moved the High Court by way of a chamber summons under s. 148 (1) and (3)

of the CPA. The application was supported by his affidavit sworn on 20/11/2018. The affidavit was accompanied by the record of Criminal Sessions Case No. 1 of 2011 and the record of Kisutu Resident Magistrate's Court P.I. No. 30 of 2015 which gave rise to Criminal Sessions Case No. 45 of 2015 hitherto pending before the High Court of Tanzania at Dar es Salaam.

The application was opposed by the respondent through a counter affidavit sworn by Tully James Helela, learned State Attorney.

Arguing the application in the High Court, the appellant contended that he had the right to be admitted on bail notwithstanding the nature of the charge with which he was charged. He relied on the provisions of articles 13 (6) and 15 (1) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) and the case of **Malick Hassan v. SMZ** [2005] T.L.R. 236. Relying also on the historical background of the case, he submitted that the chances of success by the prosecution in proving the charge are slim because, **first,** the certificate of valuation issued by the Chief Government Chemist, which was admitted in evidence in the High Court in the withdrawn case was defective for want of proof of the weight of the substance alleged to be a cocaine and **secondly**, the vital exhibit which was admitted in evidence at the trial had, by the order of the High Court been destroyed.

On his part, Mr. Helela who appeared for the respondent resisted the application arguing that the offence with which the appellant stands charged in the High Court is unbailable by virtue of the provisions of s. 148 (5) (a) (ii) of the CPA. It was his submission that, whereas the appellant's contention that the evidence would not be sufficient to prove the charge was misplaced, the authorities cited in support of his arguments were not relevant as far as determination of the application for bail was concerned. According to the learned State Attorney, the arguments were based on the appellant's misconception on the necessary matters for consideration in an application for bail.

In its ruling, the High Court found that the application was devoid of merit and thus dismissed it. The learned Judge (Masabo, J.) relied on the provisions of s. 148 (5) (a) (iii) of the CPA which prohibits grant of bail to any person charged with an offence involving heroin, cocaine and other narcotics with certified value exceeding ten million shillings. As to the reliance by the appellant on what he contended to be the shortfalls in the prosecution evidence in the withdrawn Criminal Sessions Case No. 1 of 2011 and the absence of the said exhibit, the subject matter of the charge in that case, the learned Judge was of the view that, such factors were not relevant for the determination of the

application. She agreed with the learned State Attorney that the same were raised out of misconception. She was of the view that, the main issue before the court was whether or not the appellant was entitled to be granted bail, the issue which could not be determined by considering the evidence tendered in the withdrawn case.

The appellant was aggrieved by the decision of the High Court hence this appeal. His memorandum of appeal is predicated on the following three grounds:-

"1. *That, the Honourable Judge of the High Court erred in law and fact by ignoring the provision of section 148 (1) and (3) of the CPA, Cap 20 in her decision and rejected to grant bail to the appellant while knowing that the provisions of section 148 (1) and (3) of the CPA 20 was [the enabling] section cited by the appellant in the Chamber Summons filed in the High Court for bail application, contrary to the ... law.*

2. *That, the Honourable Judge of the High Court erred in law and fact by rejected to grant bail to the appellant [by relying] on the provision of section 148 (5) (a) (ii) of the CPA, Cap 20 and ignored in her decision all the documents annexed by the appellant in his sworn affidavit supporting the application for bail, contrary to the ... law.*

3. *That, the Honourable Judge of the High Court erred in law and fact by rejecting to grant bail to the appellant and ignored the doctrine of presumption of innocence as provided in the provision of Article 13 (6)*

(b) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, [while the] offence the appellant stands charged with in the High Court in Criminal Session Case No. 45 of 2015 is not falling under unbailable offences as provided by the provision of section 148 (5) (a) (ii) of the CPA, cap. 20, contrary to the ... law."

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent was represented by Ms. Veronica Matikila, learned Senior State Attorney who was being assisted by Ms. Estazia Wilson, learned State Attorney.

Before the hearing could proceed, the appellant sought and obtained leave under Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 as amended, to argue the following two additional grounds of appeal:-

1. That the learned High Court Judge erred in law and fact in ignoring to abide by the provisions of Article 15 of the Constitution of the United Republic of Tanzania, 1977.
2. That the learned High Court Judge erred in law and fact in failing to comply with the provisions of Article 107 A (1) and 107 B of the Constitution of the United Republic of Tanzania, 1977.

When he was called upon to argue his grounds of appeal, the appellant opted to hear first, the respondent's reply submission and hereafter would make his rejoinder submission, if the need to do so would arise.

Submission in reply to the grounds of appeal was made by Ms. Wilson. She informed the Court, at the outset, that the respondent was resisting the appeal as, according to her, the same is devoid of merit. In her short but focused submission, the learned State Attorney argued that the learned High Court Judge rightly dismissed the application on account that the offence charged is not bailable. She opposed the appellant's contentions on the 1st and 2nd grounds of the memorandum of appeal, that the offence is bailable under s. 148 (1) (3) of the CPA. She argued that s. 148 (5) (a) (ii) of the CPA prohibits bail to any person charged with the offence of illicit trafficking in drugs against the Act. She argued further that, the documents which were attached to the affidavit sworn in support of the application, were not of any useful purpose to the application given the clear provisions s. 148 (5) (a) (ii) of the CPA.

It was Ms. Wilson's submission also that the High Court did not breach the provisions of Article 13 (6) of the Constitution as complained by the appellant in the 3rd ground of his memorandum of appeal because in making the decision, the learned Judge acted on the provisions of the law which prohibits grant of bail to the offence which the appellant stands charged with. Citing the case of **Attorney General v. Dickson Paulo Sanga Omari**, Civil Appeal No. 176 of 2020 (unreported), she submitted that by denying the appellant bail because

of having been charged with an unbailable offence did not amount to treating him as a guilty person.

In his rejoinder submission, the appellant maintained that the High Court erred in dismissing his application because, by virtue of the provisions of s. 148 (1) and (3) of the CPA, he was entitled to be granted bail. He stressed that, the learned Judge ought to have determined the application on the basis of s. 148 (1) and (3) used to move the High Court instead of acting on s. 148 (5) (a) (iii) of CPA. He insisted that the High Court erred in failing to consider the rights enshrined in article 15 thus failing also to exercise the powers conferred in it by articles 107 A (1) and 107 B of the Constitution to grant him bail under s. 148 (1) and (3) of the CPA.

Relying also on one of the principles of statutory interpretation as stated at pages 15 and 36 of the book, **Statutory Interpretation** by Justice G. P. Singh; that to get the meaning of a section of a statute, the statute must be read as a whole. He relied also on the documents which he had annexed to his supporting affidavit as well as the case of **Maliki Hassan Suleimani v. SMZ**, T.L.R. 236 which he had also cited in the High Court and urged the Court to reverse the decision of the High Court with an order that he be admitted to bail.

From the submissions of the learned State Attorney and the appellant, the crucial issue for our determination is whether or not the High Court erred in dismissing the application for bail filed by the appellant. It is indisputable, as pointed out above, that the appellant stands charged in the High Court with the offence of trafficking in narcotic drugs contrary to s. 16 (1) (b) (i) of the Act. It is also an indisputable fact that, in his application for bail, the appellant moved the High Court under s. 148 (1) and (3) of the CPA. Indeed, it is the provisions of s. 148 of the CPA which governs matter of bail, recognisances and bonds for persons charged with different kinds of offences. For the purpose of the offence which the appellant stands charged, we find it instructive to reproduce sub-sections (1), (3) and (5) (a) (i) – (iii) of that section:-

"148 – (1) When any person is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail the officer or the court, as the case may be, may, subject to the following provisions of this section, admit that person to bail; save that the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section.

(2) ... N/A

(3) The High Court may, subject to subsections (4) and (5) of this section, in any case direct that any person be admitted to bail or that the bail required by a subordinate court or a police officer be reduced.

(4) ... N/A

(5) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if-

(a) that person is charged with-

(i) murder, treason, armed robbery, or defilement;

(ii) illicit trafficking in drugs against the Drugs and Prevention of Illicit Traffic in Drugs Act, but does not include a person charged for an offence of being in possession of drugs which taking into account all circumstances in which the offence was committed, was not meant for conveyance or commercial purpose;

(iii) an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa or cannabis resin (Indian hemp), methaqualone (mandrax), catha edulis (khat) or any other narcotic drug or psychotropic substance specified in the Schedule to this Act which has an established value certified by the Commissioner

for National Co-ordination of Drugs Control Commission, as exceeding ten million shillings;"

To begin with, we wish to consider the appellant's contention that his application ought to have been granted because he moved the High Court under s. 148 (1) and (3) of the CPA, the provisions which according to him, empower the court to grant him bail pending his trial despite the fact that he is facing the offence under the Act. We agree with the learned State Attorney that the appellant's contention is based on misconception. Although it is true that the said provisions give the right of bail, granting of that right is subject to the provisions of sub-section (5) (a) (i) – (iii) of that section.

Since therefore, the offence which the appellant stands charged falls under items (ii) and (iii) of s. 148 (5) (a) of the CPA, the learned High Court Judge rightly refused the appellant's application for bail because, by virtue of the stated provisions of s. 148 (5) of the CPA, the offence is not bailable. The learned Judge could not have ignored those provisions merely because the applicant had cited s. 148 (1) and (3) of the CPA as an enabling provisions for his application. It is trite principle that in construing a section of the law, the statute must be read as a whole. From his submission, the appellant appears to be alive to that principle of statutory interpretation.

On the other arguments relating to the documents contained in the record of the withdrawn Criminal Sessions Case No. 1 of 2011, we also agree with the learned Judge that the same were not relevant for determination of the application. In determining an application for bail, the court was not required to weigh the chances of success of the case in terms of availability or otherwise of evidence notwithstanding the fact that there was a full trial in respect of the charge with which he has been charged afresh. As stated above, it is s. 148 of the CPA which governs the exercise by the court, of its powers of granting or refusing to grant bail.

With regard to the submission by the appellant on the 3rd ground and the two additional grounds of appeal, that by refusing to grant him bail, the learned Judge breached articles 13 (6), 107 A (1) and 107 B of the Constitution, we need not be detained much in disposing the issue which arises from those grounds, that is, whether the learned Judge breached those articles of the Constitution. As observed by the High Court, the application was determined on the basis of what is provided by s. 148 (5) (a) (i) and (iii) of the CPA. In our considered view, by resorting to the articles of the Constitution, the appellant was in effect, challenging constitutionality of those provisions of the CPA. That was not however, an appropriate forum for that purpose because the High Court

was not hearing any petition to that effect. It is similarly inappropriate to raise the issue in this appeal.

On the basis of the foregoing reasons, we are certain that this appeal has been brought without sufficient reasons. It is thus hereby dismissed.

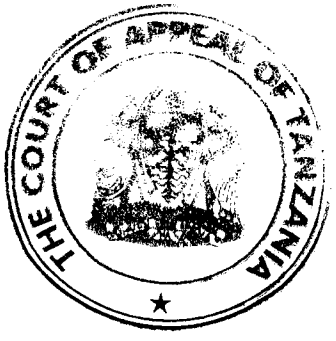
DATED at **DAR ES SALAAM** this 1st day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 7th day of September, 2021 in the presence of the Appellant in person and Mr. Kasana Maziku, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL