

IN THE HIGH COURT OF TANZANIA  
AT IRINGA

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MISCELLANEOUS CRIMINAL APPLICATION NO. 32 OF 2014

(Originating from District Court of Iringa

Original Case No. 299 of 2014)

NICHOLAS S/O GIPSON TWEVE @ MKURUGENZI ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

19/12/2014 & 29/12/2014

**R U L I N G**

KIHWELO, J.

This is a bail application filed by the applicant under certificate urgency praying for the court to admit the applicant to bail pending trial. The learned State Attorney however filed a Counter Affidavit and a Notice of the Preliminary Point of Objection to the effect that;

- (i) The application is bad in law as is brought under a wrong provision of the law.
- (ii) That the offence involved in this application is not bailable.

At the time of arguing the application the applicant opted to abandon the first ground of the preliminary objection and decided to proceed with the second ground only.

Mr. Mwinyiheri, the learned State Attorney in arguing the preliminary point of objection he pointed out that the offence which the accused stands charged is not bailable as the application for bail has been brought under Section 148(3) of the Criminal Procedure Act Cap 20 RE 2002 which requires to be read along with Section 148(4) and (5) both of which needs to be complied with.

Mr. Mwinyiheri argued further that the offence which the accused stands charged is not bailable by virtue of Section 148(5) (a) (ii) of the Criminal Procedure Act, Cap 20 RE 2002. Mr. Mwinyiheri therefore prayed that the application for bail should be dismissed.

In reply Mr. Ndelwa, the learned counsel for the defence argued that it is true that the application for bail is brought under Section 148(3) of the Criminal Procedure Act Cap 20 RE 2002 which gives power to the High Court to grant bail subject to the provisions of Section 148(4) and (5) of the Criminal Procedure Act. Mr. Ndelwa, arguably stated that these two sub-sections (4) and (5) provides for the circumstances under which the court shall not grant bail.



However, Mr. Ndelwa was of the strong opinion that the offence is bailable under Section 148(5) (a) (ii) and (iii) in which (ii) includes a person who is charged for an offence of illicit trafficking in drugs against the Drugs and Prevention of Illicit Trafficking in Drugs Act, but taking into the circumstances the drugs were not for conveyancing or commercial purposes. While (iii) restricts bail where the value of the drugs exceeds ten million shillings but in the current case the value of the cannabis sativa (bhangi) as indicated in the charge sheet is TShs. 34,000/- only, well below the amount of TShs. 10m stipulated under Section 148 (5) (iii) of the Criminal Procedure Act Cap 20 RE as well as Section 27(1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 RE 2002.

Mr. Ndelwa argued further that taking the circumstances surrounding this case the charge sheet does not indicate whether the drugs were for commercial purposes or not as such he was of the view that reading Section 148 (5) (a) (ii) and (iii) of Criminal Procedure Act Cap 20 RE 2002 along with Section 27(1)(b) of Cap 28 RE 2002 the offence to which the accused stands charged is bailable. He therefore prayed that the preliminary point of objection should be dismissed.

In his brief rejoinder, Mr. Mwinyiheri pointed out three issues. One that the provision of Section 148(5) (a) (ii) and (iii) does not necessarily need to be read together as each one stands on its own and the counsel for the defence did not produce any authority

which indicate that the two needs to be read together. As regards commercial or none commercial purposes he stressed that the provision of the law does not have that distinction whether one is charged for commercial or none commercial. Finally he pointed out that the conditions stipulated under Section 27 of Cap 95 RE 2002 are identical to those under Section 148(5) of Cap 20 RE 2002 he therefore insisted that the current offence is not bailable.

Since I made an order that the Preliminary Point of Objection will be disposed along with the application for bail I will now proceed to consider another issue which arose at the beginning of the hearing of the bail application.

At the beginning of the hearing of the bail application the court requested parties to address the propriety or otherwise of the Counter Affidavit filed by the respondent.

Mr. Mwinyiheri, the learned State Attorney conceded that the Counter Affidavit was defective for lack of the name of the attesting officer but went on to request the court to ignore the anomaly on the simple reason that the Applicant had not objected. He went on to state that the defect can be remedied and requested for time to submit an authority which supports his view.

On his part Mr. Ndelwa argued that the defect is not curable but to my surprise he went on submitting but regrettably his



submission mixed up between Verification Clause and Jurat as such it was of little assistance to the court if not none at all.

Having carefully considered the submissions by both counsels in respect of the preliminary objection and after perusal of the Counter Affidavit and the submission by the learned State Attorney there are two central issues for determination. The first issue is whether the offence which the accused stands charged is bailable and two whether the defective Counter Affidavit can be curried by amendments.

Considering the position laid down in the case of **Mukisa Biscuits Manufacturers Co. Ltd Versus West End Distributors Ltd** (1969) EA 696 I fail to see how the point of preliminary objection raised by the Respondent can be a pure point of law. This is true in particular considering the two provisions cited by both counsels namely Section 148 (5) (a) (ii) and (iii) of Cap 20 RE 2002 and Section 27 (1) of Cap 95 RE 2002 which calls for evidence in order to prove that the said drugs were for commercial purposes or not and also whether there is in place a certificate by the Commissioner for National Coordination of Drugs Control Commission as to the value of the drugs in question even though in the current case the value may not be at issue.

To this extent I think that the preliminary objection is rather misconceived premature as the respondent has an avenue to raise that point in the course of determination of the Bail Application. I therefore overrule the preliminary point of objection.

As regards to the consequences of the defective Counter Affidavit. The learned State Attorney supplied me with the decision in **Samwel Kimaro Versus Hidaya Dida, Civil Application** No. 20 of 2012, Court of Appeal of Tanzania at Mwanza (unreported) but I wish to make two quick observations. One the decision in **Samwel Kimaro** did not resolve the long established position in **Felix Mkosamali Versus Jamal A. Tamim, Civil Application** No. 4 of 2012 and **M/s Bulk Distributors Ltd Versus Hapyness William Mollel, Civil Application** No. 5 of 2008 (both unreported). This is because there is still two conflicting positions by the Court of Appeal namely the one adopted by Juma J.A and Msofe J.A on one hand and that taken by Kimaro J.A on the other hand. Secondly whereas in the **Samwel Kimaro** case the defect was merely on the omission of the name of the attesting officer in the current case the omission is not only on the name of the attesting officer but also the place where the attestation was taken and the date when the oath or affidavit was taken or made.

Consequently the Counter Affidavit is hereby **struck out** with leave to file a fresh Counter Affidavit within Seven (7) days of delivery of this ruling.

Ruling to be delivered by the District Registrar on 29<sup>th</sup> December, 20414.

P. F. KIHWELO

JUDGE

25/12/2014