

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DODOMA

MISC. ECONOMIC CAUSE NO. 2 OF 2017

(Originating from Singida District Court Economic PI No. 15/207)

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| 1. SALEHE S/O SAID @ MOHAMED 2. ADAM S/O MAULID @ SAID 3. HERI S/O JUMA 4. MARIAM D/O KOMBA | } | APPLICANTS |
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VERSUS

THE REPUBLICRESPONDENT

RULING

14/08/2017 & 15/08/2017

F. N. MATOGOLO, J.

The applicants Salehe s/o Said @ Mohamed, Adam s/o Maulid @ Said, Heri s/o Juma and Mariam d/o Komba, first, second, third and fourth applicant respectively are facing two counts in the court of Resident Magistrate Singida. The first count is for conspiracy to

commit an offence c/s 384 and 386(1)(f) of the Penal Code. The second count is unlawful Trafficking in narcotic drugs contrary to section 15 (1) (b) and (2) of the Drugs Control and Enforcement Act, No. 5/2015 read together with paragraph 23 of the first schedule to, and section 57 (1) and 60 (1) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2002] as amended by section 13 (b) (2) (3) and (4) of the Act No. 3/2016.

It is alleged that the applicants were trafficking in narcotic drugs to wit 30 kilograms of khat (mirungi)

The applicants have filed application for bail to this court. The application is by chamber summons made under Article 13 (6) (b) of the constitution of the United Republic of Tanzania 1977 as amended from time to time, section 148 (1) of the CPA, section 29 (3) of the Drugs Control and Enforcement Act, No. 5/2015 and section 36 (1) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2002]. The same is supported by the affidavit of Mr. Christopher Bulendu who is the applicants advocate.

On the date of hearing Mr. Mkami advocate appeared for the applicants, and Ms. Janeth Mgoma State Attorney appeared for the respondent/Republic.

It was the submission by Mr. Mkami learned Advocate that they filed this application under the certificate of urgency and the ground is that the 4th applicant was pregnant but now she has already given birth to a child on 24/07/2017. The second reason he

gave is that by the nature of the charge the applicants are facing, it is likely to take a long time before trial commences.

With regard to the application itself, Mr. Mkami learned advocate submitted that the applicants are facing two counts in the Court of Resident Magistrate Singida. The first count is conspiracy to commit an offence and the second count is unlawful trafficking in narcotic drugs c/s 15 (1) (b) (2) of the Drugs Control and Enforcement Act, No. 5 of 2015, read together with paragraph 23 of the first schedule and section 57 (1) and 60 (1) of the Economic and Organized Crimes control Act, Cap 200 as amended by section 13 (b) (2) (3) (4) and 16 (b) of Act No. 3 of 2016. He said, the Republic has no problem with the first count. But their problem is with the second count, but on their part, even the second count is bailable offence.

That the applicants are charged with unlawful trafficking in narcotic drug, "*Khat*" popularly known as "*mirungi*", weighing about 30 kilograms.

Mr. Mkami submitted that bail is a constitutional right to the accused as provided under article 13 (6) (b) of the URT constitution which provides for presumption of innocence to the applicants. That, count No. 2 is bailable under section 29 (1) of Act No. 5/2015. This section listed the offences which are not bailable. That is, accused charged with an offence which involve narcotic drug with weight of 100 kilograms or more, that person cannot be granted bail. But he

said the present applicants were found possession 30 kilograms of khat. So they are entitled to bail. Mr. Mkami also submitted that by considering the health condition of the 4th applicant, and due to the fact that she has recently given birth to the child, in the interest of the 4th applicant and her newly born child, she has to be released on bail.

Mr. Mkami further submitted that the applicants have never violated conditions for bail in any previous case or punished to imprisonment for a term exceeding three years. That the applicants have not committed any offence while out on bail. Mr. Mkami prayed that the applicants be granted bail pending their committal in the preliminary inquiry case pending before their District Court.

Ms. Mgoma learned State Attorney objected the application, that the applicants should not be granted bail because although the Drugs Control and Enforcement Act, No. 5/2015, in section 29 (1) (b) permits bail for offences of unlawful Trafficking in narcotic drugs specifically Khat involving weight below 100 kilograms. That the offence which the applicants are facing is under section 15 (1) (b) (2) of Act No. 5/2017. That the only court with jurisdiction to hear the case is this honourable court.

But section 36 (4) (f) of the Economic and Organized Crime Control Act, Cap. 200 R.E 2016 denies bail for offences under Act No. 5/2015, that is economic offences. She said the drugs offences fall under economic offences, thus are not bailable.

Ms. Mgoma learned State Attorney submitted that Cap 200 R.E. 2016 was passed by the parliament after Act No. 5/2015 was enacted. The legislature therefore in passing Cap. 200 R.E 2016 were aware of the existence of Act No. 5 of 2015. And enacted Cap 200 R.E 2016 to deny bail to persons charged with such offences.

The learned State Attorney stated further that Cap 200 R.E 2016 is more current, compare to Act No. 15/2015. The learned State Attorney asked this court, while interpreting the two provisions, to consider the more current legislation and that the applicants should not be granted bail, she concluded. In rejoinder, Mr. Mkami Advocate submitted that section 36 (4) (f) of Cap. 200 R.E 2016 relied upon by the respondent that the said provision was passed by the legislature while aware of the existence of section 29 (1) (b) of Act No. 5/2015. So the court should follow the intention of the parliament. The learned counsel disagreed with that position of the learned State Attorney and viewed as her own position as she did not support it with any document such as the hansard of the parliament to show that was the intention of the legislature. Mr. Mkami learned advocate Prayed to this court not to be waived by the personal position of the learned State Attorney and deny bail to the applicant.

Mr. Mkami said there are two conflicting provisions, that is S. 36(4) (f) of Cap 200 R.E 2016 and S.29 (1)(b) of Act No. 5/2015. But he said Cap 200 R.E 2016 is a general law for economic crime offences

but Act No. 5 of 2015 is a specific legislation for drugs offence. That this specific law is the one under which the applicants are charged. This law under section 29 (1) (b) permits grant of bail to persons charged with unlawful Trafficking in khat with weight below 100 kilograms. That the offence the applicants are charged with fall under this category. The applicants therefore have right to be released on bail. And also by taking into account the health condition of the 4th applicant which is not good, and also by taking into consideration that the offences the applicants are charged are bailable ones, their bail should not be restricted unreasonably, so he prayed that the applicants be granted bail.

From the foregoing, there is no dispute that the offence the applicants are facing is an economic offence.

It is alleged that the applicants were trafficking in narcotic drug, that is khat weighing 30 kilograms. Section 29 (1) (b) provides list of offences which are not bailable. For the offence of unlawful trafficking in narcotic drugs, specifically khat. It is until when that narcotic drug exceed the weight of 100 kilograms. But for the khat with weight below 100 kilograms, that is bailable one.

The khat which the applicants were found possessing is 30 kilograms which is far below 100 kilograms, thus is bailable. Although section 36 (4) (f) of the Economic and Organized Control Act prohibits grant of bail for person charged with economic offence, the present charge being among them, but as there is a

specific provision allowing grant of bail to accused who commits like offences, then section 36 (4) (f) as a general provision cannot be applied. But the specific law, that is section. 29 (1) (b) is the one which will be applicable. This is in accordance to the principle of statutory interpretation, that where there are conflicting provisions of the law between a specific provision and a general provision, the specific provision has to take precedence. I did not quickly get authorities from our jurisdiction to support this legal position but the Supreme Court of Canada in the case of **Lalonde Vs. SunLife (1992)** **35 CR 261**, held;-

"This is an appropriate case in which to apply the maxim generalia specialibus non derogant and give precedence to special Act.....

The principal is therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act give a complete on the subject, the expression of the rule act as an exception to the subject matter of the rule to the general Act."

Act No. 5 of 2015 is a special Act for offence relating to drugs and as the applicants are charged with the offence of trafficking in drug whose weight is below 100 kilograms, they are therefore entitled to bail as a matter of law. There are no other reasons

advanced by the learned State Attorney justifying denial of bail to the applicants.

Bail is a constitutional right if not restricted by law. The applicants personal freedom should not therefore be unreasonably curtailed. The applicants at the moment are still suspects and presumed innocent until when it will be proved otherwise. It is on that ground they are entitled to bail. In exercising its discretion to grant bail to the accused or not, the court must consider all important factors relating to bail. The court should be free, wise and independent. And should consider only the relevant laws, principles, rules and all circumstances surrounding the case under consideration in order to arrive at a just decision that guarantee proper and fair trial so as to meet the end of justice. In granting bail to the accused, the court has to balance the interests of the accused, that is his freedom should not be unreasonably curtailed before he is found guilty. on one hand, but also to make sure that the accused continues to attend his trial up to the end. But on the other hand the release of the accused on bail should not be detrimental to the society.

Having stated as afore said, I grant the applicants application. The applicants may be released on bail upon fulfilling the following conditions;-

- (1) Each applicant has to execute bail bond in the sum of Tshs. 30,000,000/=.

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- (2) Each applicant has to produce two reliable sureties one must be a Government employee who each shall execute bail bond in the sum of Tshs. 30,000,000/=.
- (3) Each surety has to deposit in court a title deed of immovable property of value not less than Tshs. 30,000,000/= which is free from any encumbrances. The Title deed must first be verified by the Registrar of Titles or any other recognized Authority of similar capacity
- (4) The applicant should not leave jurisdiction of the Court of Resident Magistrate Singida without prior permission from the Resident Magistrate incharge of that court.
- (5) The applicants have to report to the RCO Singida once in a month.
- (6) The bail documents shall be verified and approved by the Deputy Registrar – Dodoma or the Resident Magistrate incharge Singida before the applicants are released on bail.

It is so ordered.



F. N. Matogolo
F. N. MATOGOLO

JUDGE

15/08/2017