IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 44 OF 2018

HASSAN ABDALLAH BANDA

VERSUS

THE REPUBLIC

RULING

19/10 & 26/10/2018

Korosso, J.

An application is before this Court filed by Hassan Abdallah Banda, the applicant, by means of chamber summons supported by an affidavit affirmed by the applicant. The application is made pursuant to section 36(1) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002 (to be referred to as the EOCCA hereinafter) and section 29(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015. In reply, the Respondent Republic filed a counter affidavit sworn by Ms. Tully James Helela, State Attorney, for which on paragraph 4 avers "*That, the Respondent replies to paragraph 2, 3, 4 and 6 of the affidavit and states that the offence charged is a non bailable offence*".

During the hearing, the applicant was represented by Mr. John Nyange, Learned Advocate and Ms. Tully Helela, learned State Attorney represented the Respondent Republic.

On the date fixed for hearing, the Court invited the parties, to address the Court on whether the cited provisions to move the Court are proper, especially section 29(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 (to be referred to as the Drug Act hereinafter). That the said issue raised by the Court, should be part of their submissions to this Court when amplifying on the application before the Court.

From the affidavit supporting the application, and also the oral submissions by the applicant's counsel, the applicant is charged with the offence of Trafficking in Narcotic Drugs contrary to section 15(1)(b) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to and Section 57(1) of the Economic and Organized Crime Control Act, in the Resident Magistrate's Court of Dar es Salaam Region at Kisutu, in Economic Case No. 57 of 2017 as can be seen in a copy of the charge sheet annexed to the affidavit supporting the application. The particulars of the offence are that the applicant, on the 25th of August 2016 at Mbezi Kibanda ch Mkaa area within Kinondoni District in Dar es Salaam Region was found trafficking 7 bags of Narcotic drugs, namely, cannabis sativa weighing 152.71 kilograms.

Addressing the issue of competency of the application raised by the Court, the leaned Advocate for the Applicant, conceded to the fact that by virtue of section 29(1)(a) of the Drug Control Enforcement Act, the offence charged against the applicant is unbailable and therefore that it was improper to cite the said provision to move the Court to hear and determine the application.

Despite this fact, the counsel submitted that, the remaining cited provision, section 36(1) of EOCCA Cap 200 RE 2002, is proper to move the Court and therefore enough to move the Court, and thus for the Court to find that it has been properly moved and that the application is competent.

The applicant's counsel also submitted that, the applicant being accused of an economic offence, has a right to apply and be considered for bail by virtue of Article 13(6)(b) of the Constitution of United Republic of Tanzania, the article providing for the presumption of innocence against accused persons. The counsel argued that it is imperative when the Court considers the application, to bear in mind this fact and also that the applicant should not be treated as if he has already been convicted. At this juncture we find it important to interject by stating that, despite the oral reference in Court of Article 13(6)(a) of the URT Constitution by the counsel for the applicant, the respective Article not part of the cited provisions to move the Court to hear and determine the application.

The learned counsel also submitted that the fact that the respondents did not provide alternative provisions to be cited, where they contend the cited provisions by the applicants are improper to move the Court, their assertion should not be considered. That their understanding is that where a statute exits and is operative such as the Drug Control and Enforcement Act, the law continues to be valid until a Court declares that the statute or a provision in a statute in unconstitutional. That this

notwithstanding, a Court has a duty to hear and determine an application for bail, and to grant bail having considered circumstances pertaining to the offence charged in an application before it for consideration.

Another assertion by the applicant submitted through his counsel, was that charges related to economic offence like the one he faces, that is, suspicion that he was arrested with narcotic drugs, that is, "*bhang*" (*cannabis sativa*) are allegations yet to be proved. That circumstances pertaining to his arrest and the whole case do not lead for one to perceive that it is true he was found with the alleged narcotic drugs. That the circumstances that should be considered, is the fact that, the arrest was in 2016 and up to 19/10/2018, the date of hearing, the Republic have yet to prove that the applicant was found trafficking narcotic drugs as alleged. That this being the position doubts exit on the verity of the charges, and therefore any doubts should benefit the applicant. The counsel for the applicant stated further that, the obtaining circumstances have left the applicant to feel that justice has not been done to him. That this can be discerned from the fact that the Republic has yet to initiate a trial, nor committal proceedings, nor a preliminary hearing conducted related to the offence charged. Therefore, no proof is before the Court that the applicant was found trafficking narcotic drugs so that section 29(1)(b) of the Drug Control and Enforcement Act, be applied to his case to deny him bail.

According to the applicants counsel, the Court should also consider the fact that the Director of Public Prosecution has not

registered any objection to the application. That in view of this continued incarceration of the applicant contravenes Article 15(1) and (2) of the Constitution of the United Republic of Tanzania. The applicants implored the Court to allow evidence to be brought in Court to show that the applicant was found trafficking 'bhang" as alleged. They submitted that the charges are vexatious without substance, that the applicant is a young man and a student who has been incarcerated for a long time which has affected him psychologically and mentally. The applicant's counsel also submitted that the Court should consider the fact that the applicant filed the application himself not awaiting the assistance of an advocate and thus showing due diligence and being tired of being imprisoned.

The applicants prayed that the Court use section 36(1) of the EOCCA and grant bail to the applicant, and that they had put section 29(1)(b) of the Drug Act, having regard to the fact that the allegations of the charges of trafficking of narcotic drugs of such weight has yet to be proved.

On the part of the Respondent Republic, their position with regard to the cited provisions to move the Court to hear and determine the application, was that, having regard to the charges against the applicant, where the applicant is alleged to have been found trafficking 152.71 Kgs of *cannabis sativa.* That this is over 100kgs, beyond the weight described in the said provision, where an accused can be granted bail. The learned State Attorney contended that, under section 29(1)(b) of the Drug Control and

Enforcement Act, the offence for which the applicants is charged is unbailable, and therefore this provision cannot properly move the Court to hear and determine the application. That, this fact, was also alluded in the respondent's counter affidavit, paragraph 4.

The learned State Attorney also challenged the learned applicant's counsel submission, contending that the said submissions concentrated on addressing and challenging the charges against the applicant, on the fact that they have not been proved. That this was premature, because charges against accused persons are dependent on finalization investigations and the DPP is the one vested with powers to decide the charges to be drawn. That before the Court is an application for bail, as prayed by the applicant, and it is not the time to address the elements of the offence charged. That discussions on elements of offence charged may ensure during trial and whether or not charges have been proved or not will depend on the evidence submitted before the Court for determination. With regard to the assertion by the applicant's counsel on allegations of abrogation of constitutional articles, the learned State Attorney contended that this Court, was not the proper avenue to challenge constitutional provision, this should be done through a constitutional petition, where the applicants will have leave to challenge claims of unconstitutionality of legal provisions. The Respondents thus prayed that the application be dismissed since the offence charged against the applicant is unbailable and also from the fact that the Court has not been properly moved.

The applicant's counsel rejoinder was effectively to reiterate their submissions in chief, and also raised a concern that they were yet to be served with the counter affidavit and therefore any reference to it was inappropriate. The learned counsel also challenged the assertion by the learned State Attorney that the Court has not been properly moved while not stating which provisions should have been cited to properly move the Court if they found so.

On the issue of filing a constitutional petition, the learned counsel for the applicant stated that they did not want to do that, because the applicant was not found in possession of the alleged "*bhang*" as charged and in any case where there is an abrogation of the Constitution it was the duty of the Court to ensure protection of the Constitution without being moved by anyone to interfere, what is necessary is for the Court to just be informed. That the incarceration of the applicant for such a long time has defeated the aim of putting an accused in custody, which is to limit interference with investigations, but with the time he has been imprisoned no one can say at this juncture he will interfere with investigations if he is granted bail as prayed. They thus reiterated the applicant's prayer to be granted bail pending hearing of the offence charged.

We have carefully considered the submissions before the Court and the cases cited by the respondents and the applicants in support of their positions in this matter. We shall first address the issue raised by the applicants counsel during his submissions that he was not availed with the Respondents Counter affidavit therefore

prayed the Court not to consider the contents therein. It is on record that on the 04/09/2018, the respondents prayed for time to file a counter affidavit and that it was filed on 6th September 2018 as ordered by the Court. On the 7th of September 2018, when the matter came for hearing, the applicant's advocate entered appearance, though, at the start he stated he was ready to proceed, after some time he prayed for adjournment stating he had forgotten an authority he wanted to share with the Court relevant to the hearing. The Court granted the prayers and hearing was adjourned to 28th September 2018. There was no query from the applicants on not being served with a counter affidavit.

On the 28/09/2018, the applicant's counsel failed to appear and we were informed that he had travelled, and hearing was adjourned to 4th October 2018. On the 4/10/2018, John Nyange, the applicants advocate entered appearance but prayed for adjournment stating he has just arrived from a trip and therefore could not represent his client in the stage of tiredness he was in. There was no any query to counter affidavit. The Court fixed the 19th of October 2018 for hearing. On the 19/10/2018, the applicants counsel appeared in Court, and stated he was ready to proceed never questioning the counter affidavit. In his submission in chief he never mentioned lack of service of the counter affidavit only alluding to this during the rejoinder. We find that this was an afterthought, and in any case the main issue discussed in the counter affidavit different from the averments in the applicants affidavit were the contents of paragraph 4, alluding the fact that the offence charged against the applicant is not bailable, a fact we feel

the applicants was aware of, and any consideration of the counter affidavit we find will not in any way prejudice the rights of the applicant. In any case the Court has just narrated a counter affidavit having been filed nothing else to lead to its decision, since the other matters are obvious matters which the Court will have addressed even in the absence of the counter affidavit, hence the issue raised *suo motu* by the Court which the parties were invited to address, which related to the provisions declaring the offence charged unbailable for which the applicants also were given space to respond.

We now proceed to consider the issue of competency of this application in view of the provisions cited to move the Court to hear and determine the matter. We find that considering the fact that the applicant counsel conceded to the fact that having regard to the law, section 29(1)(a) of the Drug Control and Enforcement Act, No. 5 of 2015 is not a proper provision to move the Court for the matter before the Court. This is because the said provisions, with the amendments brought in by Act No. 15 of 2017, states that where the charges against the accused person relate to narcotic drugs (including heroine) weighing above 20 Kgs or more the offence is not bailable.

Suffice to say according to the charge sheet, which is annexed to the applicants affidavit, it reveals that the applicant is stated to have been found trafficking in narcotic drugs, that is, cannabis sativa, weighing 152.71 Kilograms contrary to section 15(1)(b) of the Drug Control and Enforcement Act on the 25th of August 2016,

which is before the provisions of Act No. 15 of 2017 were not operative and thus at the time, the threshold for weight of cannabis sativa which fell under unbailable offence was 100kgs. Meaning the offence committed in view of the weight was still unbailable.

The applicants counsel has prayed that the Court find the application competent by virtue of the cited section 36(1) of the EOCCA. The said section provides that:

> "*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 or bail*".

But it should be borne in mind that by virtue of section 29(4) of the Drugs Control and Enforcement Act, the provision relating to bail under section 148 of the Criminal Procedure Act shall apply mutatis mutandis to bailable offences under the Drug Control and Enforcement Act, thus effectively stating that the applicable provision with regard to bail for bailable offences under the Economic and Organized Crime Control Act, is section 148 of CPA. Therefore this being the case we find that, the citing of section 36(1) of the EOCCA alone to move the Court is not proper. This because procedure for trial of offences under the Drugs Control and Enforcement Act, is guided by the provisions under the said Act first unless there is a lacuna. There is no doubt that the Economic and Organized Crime Control Act, Ap 200 RE 2002 applies, but

provisions under the Drugs Control and Enforcement Act, take precedence.

The Court has also considered the applicant's submissions on the principles guiding fair trial and that this is grounded on the presumption of innocence propounded under Article 13(6)(a) of the URT Constitution. It is important to remind ourselves that a trial may be defined as a legal process where an impartial tribunal formally examines the evidence presented by the parties to a dispute, and makes the decision on the rights and or liabilities of the parties before it. In ***Musa Mwaikunda*** vs R (2006) TLR, the Court of appeal defined their understanding of the minimum standards for a fair criminal trial, stating that the accused person must:

(a) Understand the nature of the charge;

(b) Plead to the charge and exercise the right to challenge;

(c) Understand the nature of the proceedings namely, that it is an inquiry as to whether the accused committed the offence;

(d) Be able to follow the course of the proceedings;

(e) Understand the substantial effect of any evidence that may be given in support of the prosecution; and lastly;

(f) Be able to make a defence or to answer the charge.

With regard to this assertion it is important to bear in mind the holding in the case of ***DPP vs. Bashiri Waziri and Mugesi Antony***, Criminal Appeal, No. 168 of 2012, CAT Mwanza Registry (unreported) where the Court considered the matters related to principles of fair trial in bail applications and stated:

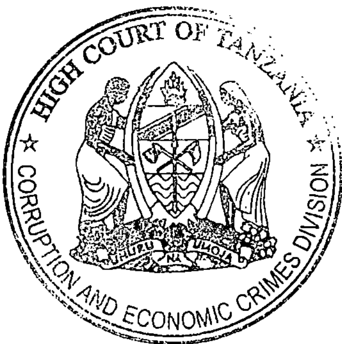
"*we agree with the sentiments expressed by the learned High Court judge that denial of bail seemingly goes against the provisions of Article 13 (6) (b) of the Constitution of the United Republic of Tanzania which underscores the presumption of innocence, as well as Article 15 (2) (a) and (b) which guarantees personal freedom, subject of course to the provisions of the laws of the land. We are therefore of the view that since the denial of bail is necessarily an inroad into the personal freedom of a person and is against the presumption of innocence, it can only be justified as a matter of public policy, clearly spelled out in an enactment of the law*"

This being the restated position, being bound by the said holding we similarly tale cognizance of the existence of the provisions of section 29(1)(b) of the Drug Control and Enforcement Act, which curtails grant of bail for those accused of trafficking cannabis sativa weighing more than 100 kilograms at the time, the accused was arrested.

It is important to also understand that at this juncture, the role of the Court is not to scrutinize the charges against the accused person apart from for purposes of consideration of whether or not the offence charged is bailable, that role is left to the court where the case is pending at this juncture or where committal proceedings have been finalized, then it will be the role of the trial court, or where the DPP issues a certificate for the matter to be determined by a subordinate court, therefore the relevant Court may scrutinize the charges against the accused person. This is not the time, for the applicant to pray the Court to seek evidence to

prove whether or not the charges are fair or that they cannot be proved, that role is left for the trial court.

We also find the contention by the applicants counsel that where the respondents challenge the cited provision they have to provide the relevant provision is unwarranted in the current case, since the matter relating to consideration of whether or not the cited provision was proper was moved *suo motu* by the Court. Therefore, at this juncture for reasons stated hereinabove, we find that the application is incompetent, for failing to cite provisions to move the Court to hear and determine the application having regard to the circumstances obtaining, including the fact that the offence charged is unbailable. The application is struck out. Ordered.



Winfrida B. Korosso
Judge
26th October 2018