

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CRIMINAL APPLICATION NO. 214 OF 2019

(Originating from Criminal Session No.34 of 2015 at the Resident Magistrate
Court of Dar es Salaam at Kisutu).

MUSSA MAKOTA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 12.12.2018

Date of Ruling: 20.12.2018

KALUNDE, J.

This is a ruling in respect of an application for bail. The application has been preferred by way of a chamber summons made under is made under Articles 13(6)(b) and 15 of **the Constitution of the United Republic of Tanzania, 1977** (the Constitution); section 148(5)(a)(iii) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (CPA); and section 27(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap.95 R.E. 2002].

The applicant stands charged, in Criminal Session No. 34 of 2015, with the offence of **trafficking in narcotic drugs** contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap.95 R.E. 2002].

It is alleged that on the 05th day of July, 2013 at Misugusugu area within Kibaha District in Coast Region, the applicant was found trafficking from Mororogoro to Dar es Salaam, Ninety five kilograms (95) kilograms of Narcotic Drugs namely Cannabis Sativa known as bhang valued at Tanzania Shillings Nine Million Five Hundred Thousand (Tshs. 9,500,000.00) loaded in a motor vehicle with registration No. **T.386 CEP** make **TOYOTA COROLLA**.

At the hearing this application the applicants retained the services of Miss. Modesta Medard, learned advocate; and the respondent/Republic had the services of Miss. Elizabeth Mkunde, learned State Attorney.

Submitting on behalf of the applicants, Miss. Modesta stated that, according to the charge sheet, the applicant was found trafficking cannabis sativa (bhang) valued at Tshs. 9,500,000.00. Consequently, he was charged under section 16(1)(d) of the Drugs and Prevention of Illicit Traffic in Drugs Act, No.9 of 1995. She further argued that, at the time of his arrest section 27(1)(b) of Act No. 9 of 1995 allowed the applicant to be granted bail, imploring the consequent repeal of the Act and re-enactment into

the Drugs Control and Enforcement Act, No. 5 of 2015 did not have any effect to the applicants' application or his rights thereof. She referred us to Article 13 (6)(c) of the Constitution.

The applicants counsel also submitted that, the applicant has never been previously convicted on any offence or jumped bail and that he was ready to comply with the bail terms as may be set by the Court. She prayed that the application be granted and the applicant be admitted to bail.

On the part of the Respondent Republic, urged the Court to adopt the counter affidavit submitted in support of objection to the application. She admitted that the applicant was charged under section 16(1)(b) of Act No. 9 of 1995 but added that the offence for which the accused is charged with is not bailable since the proper section applicable for bail was section 148(5)(a)(ii) of the CPA. She added that since the CPA was not amended then the applicant was not affected by the repealed law.

The learned State Attorney contended that, previously, a charge sheet would disclose the value of the narcotic drugs, and subsequent amendments granted bail on the basis of the weight and not value of the narcotic drugs and thus the use of weight, introduced by the new law, would not apply in the present case. Citing the decision of the High Court decision in **Hassan Abdallah Banda vs. Republic, Misc. Economic Cause No. 44 of 2018** she submitted that denial of bail can be justified as a

matter of public policy a clearly stated in an enactment of law. She concluded that section 148(5)(a)(ii) of the CPA clearly spell out that the offence for which the accused is charged with is not bailable, as such it is not unconstitutional to refuse bail to the applicant.

The applicant's counsel rejoinder was effectively to reiterate their submission in chief, she also added that section 27(2) of Act, No.9 of 1995 acknowledged the existence of section 148(5)(a)(ii) of the CPA and therefore the said section, section 148(5)(a)(ii), cannot be said to be the only section applicable in granting bail. She thus reiterated the applicants' prayer to be granted bail pending hearing of Criminal Session No. 34 of 2015.

I have carefully considered the submissions before the Court and the authorities cited by the respective learned counsels in support of their positions in this matter. I would first address the issue that appear to catch the attention of both, the counsel for the applicant and the respondents counsel, this relates to the question whether the applicant should be granted bail on the basis of the value of the cannabis sativa (bhang) or weight. Certainly, it is not a disputed fact that the applicant stands charged under 16(1)(b) of Act No. 9 of 1995.

It is also not disputed that, under section 27(1)(b) of the Act (Act No. 9 of 1995) bail was not granted to a person accused of an offence involving cannabis sativa exceeding ten million shillings.

It therefore follows that, an offence involving cannabis sativa less than ten million shillings was bailable as of right. For avoidance of doubts the entire section 27 reads: -

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

(a) that person is accused of an offence involving trafficking in drugs, narcotics or "psychotropic substances" 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 19 not meant for conveyance or commercial purpose;

*(b) **that person is accused of 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 the National Co-ordination of Drug Control **exceeding ten million shillings.** [emphasis mine]*

(2) The conditions on granting bail specified in section 148 of the Criminal Procedure Act, shall apply mutatis mutandis to all bailable offences under this Act."

Suffices to say that according to the charge sheet, which is annexed to applicants affidavit, the applicant was, in 2013, found trafficking narcotic drugs, that is, cannabis sativa, weighing ninety five (95) kilograms which was valued at Tshs. 9,500,000.00. At the time of arrest and consequential arraignment in court the offence was bailable under section 27(1)(b) of the Act. This was before the promulgation of the Drugs Control and Enforcement Act, No. 5 of 2015, which under section 29(1)(b) the threshold for weight of cannabis sativa which fell under unbailable offence was 100 kilograms or more. This means that the offence for which the applicant was charged with was still bailable until 2015 up until 2017 when the amendments introduced by Act No. 15 of 2017, set the threshold for weight of cannabis sativa which fell under unbailable offence to 20 kilograms or more.

Mindful of Article 13 (6)(c) of the Constitution of the United Republic of Tanzania, 1977 which reads: -

"...no person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed;"

In further cognizance of Article 13(6) (b) and Article 15 of **the Constitution of the United Republic of Tanzania, 1977, I**

am of the considered view that, since the applicant remains charged under 16(1)(b) of Act No. 9 of 1995, the applicable bail conditions are those stipulated under section 27(1)(b) of the same Act (Act No. 9 of 1995). Since, under the said Act, the threshold for the value of cannabis sativa which fell under unbailable offence was those exceeding ten million, given that the value for which was accused with was nine million five hundred thousands, the applicant was entitled to bail as of right. The argument that the applicable section is section 148(5)(a)(ii) of the CPA is untenable.

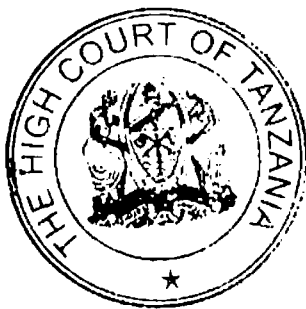
In the upshot, I hereby grant bail to the applicant on fulfilling the following conditions;

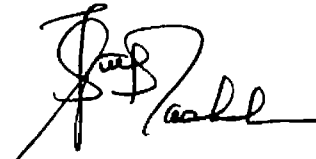
- (1). The applicant shall deposit in this court a sum of Tshs. 4,750,000.00 in cash or in the alternative, he shall deposit to the custody of the Court, a title deed of an immovable property to the equivalent amount;
- (2). The applicant should have two credible and reliable sureties; to be introduced by ward leaders with fixed abode within the jurisdiction of the Court;
- (3). The of the two sureties shall execute a bail bond in the sum of Tshs. 2, 375,000.00;
- (4). The applicant shall immediately surrender his passport or any travelling documents in his name to Registrar

High Court of Tanzania, Dar es Salaam District Registry;

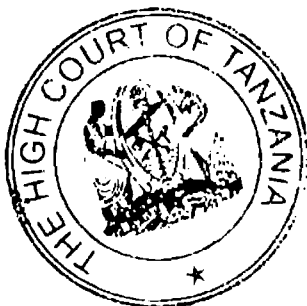
- (5). The applicant shall be duty bound to appear in court on all dates that shall be scheduled by the court in Criminal Session No. 34 of 2015 pending before High Court, Dar es Salaam District Registry; and
- (6). Bail conditions to be ascertained/verified by the District Registrar High Court of Tanzania, Dar es Salaam District Registry.

Order accordingly.




S.M. Kalunde
JUDGE
20/12/2019

Court: Ruling delivered in chambers in the presence of the Applicant in person and Imelda Mushi, learned State Attorney for the Respondent.




S.M. Kalunde
JUDGE
20/12/2019