

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 104 OF 2020**

(Originating from the District Court of Rufiji District in Economic Case No. 14 of 2019)

**1. Haji Mwalami Mkumba**

**2. Adinani Athumani Bidabida ..... APPLICANTS**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

*Date of Last Order: 18.06.2020*

*Date of Ruling: 24.06.2020*

**Ebrahim, J:**

The applicant has moved this court under the provisions of **Section 36(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2019 as amended by Act No. 3 of 2016 and Section 148(1) of the Criminal Procedure Act, Cap 20 RE 2019** praying for bail pending trial. The chamber application is supported by affirmed affidavits of Haji Mwalami Mkumba and Adinani Athumani Bidabida, the applicants.

Brief background of this application as could be discerned from the charge sheet filed in the court file is that the applicants are jointly charged in the District Court of Rufiji District at Kibiti with the offence of being unlawfully found with possession of narcotic drugs of psychotropic substance contrary to **section 15(2) of the Drugs Control Enforcement Act No. 05/2015 CAP 95 as amended in 2018 read together with paragraph 14 of the 1<sup>st</sup> Schedule to and section 57 (1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 as amended by Written Laws (miscellaneous amendment) Act No. 3 of 2016.** It was alleged by prosecution that the duo were on 17<sup>th</sup> June 2019 at about 0220hrs at Kwangwazi area in Mkongo village within Rufiji District in Coastal Region unlawful found being in possession of narcotic drugs or psychotropic substance commonly known as Cannabis Sativa (Bhang) weighing 133kgs without permit from the authority.

At the hearing of this application, the applicants were represented by advocate Jeston Justin ; and the Republic was represented by Ms. Deborah Mcharo, learned State Attorney.

Mr. Justin prayed for the court to grant bail to the applicants because the offence that they are charged with is bailable and the applicants have

been in custody for more than year. He submitted further that the applicants have families depending on them and they have reliable sureties who are ready to meet the conditions set by the court. He finally added that being incarcerated without bail infringes their constitutional rights under **Article 13(6)(b)** on the presumption of innocence and he prayed for applicants to be granted bail.

Responding to the argument by the Counsel for the applicants, Ms. Mcharo learned State Attorney objected the grant of bail to the applicants. She argued that the applicants are charged under **section 15(2) of Act No. 5 of 2018** and the offences charged under the said provision of the law are not bailable. She contended further that being found in possession of more than 20kgs of specified drugs is automatic drug trafficking considering that the applicants have been found with 133kgs of bhang. She stated that according to **section 29(1)(b) of Act No. 5/2018 read together with section 29(3) of the same Act; section 148(5)(3) of the Criminal Procedure Act** is applicable. She prayed for the application to be dismissed.

In rejoinder, Mr. Justin referred to **section 3 of the Act No. 5/2018** and argued that the term "Trafficking" is not synonymous to "Possession". He urged the court to consider bail on the reason that the 2<sup>nd</sup> applicant has a

heart condition and more so **section 36(4) of EOCCA** does not provide for the offence that the applicants are charged with. He reiterated his prayers.

I have carefully followed the submissions made by the rival parties in support of their positions in the matter. The main question here is whether the applicant is entitled to be granted bail under the governing laws.

Indisputably is the fact that the applicants have been charged with the offence of unlawfully being found with drugs under the provisions of **section 15(2) of CAP 95** as amended. The said provision of the law reads:

*"15.(2) Any person who produces, **possesses**, transports, exports, imports into the United Republic, sales, purchases or does any act or omits anything in respect of drugs or substances not specified in the Schedule to this Act but have proved to have drug related effects, commits an offence, and upon conviction shall be sentenced to life imprisonment."* (Emphasis is mine)

The learned State Attorney has argued before the court that following the new amendments and in reading **section 29(1)(b) and (3) of CAP 95** read together with **section 148(5)(3) of the Criminal Procedure Act, Cap 20**,

the offence which the applicants are charged with under **section 15(2) of Cap 95 as amended** is not bailable. Counsel for the applicants insists that the offence is bailable as the said offence is not listed among the non-bailable offences under the provisions of section 36(4) of EOCCA and the word trafficking is not synonymous with the word possession.



**Section 29(1)(b) of Cap 95 as amended** prohibits grant of bail to an accused person who is charged with the offence of drug trafficking of cannabis sativa (Bhang) weighing more than 20 kilograms. **Section 29(3)** calls for the applicability of the provisions of **section 148 of the Criminal Procedure Act**.

Again, **section 2 of Cap 95** has also been amended by **Section 3(g) of Act No. 15 of Drug Control and Enforcement (Amendment) Act, 2017** by defining the term "trafficking" to mean *the importation, exportation, buying, sale, giving, supplying, storing, **possession**, production, manufacturing, conveyance, delivery or distribution, by any person of **narcotic drug** or psychotropic substance any substance represented or held out by that person to be a **narcotic drug** or psychotropic substance or making of any offer..."* (emphasis is added)

The catch word in the above amendment is the inclusion of the word **possession** in the offence of trafficking meaning that under the new amendments the offence of being found in possession of narcotic drug falls under the definition of trafficking under the law. Thus the restrictions of bail depending on the weight apply.

Counsel for the applicants has argued that **section 36(4) of the EOCCA** has not listed the offence that the applicants are charged with. However, I would wish to state here that the offence that applicants are charged with is a created by its own written law which clearly lists the offences and prohibition of bail depending on the weight.

From the above background I find that the applicant's application for bail is untenable and I accordingly dismiss it.

   
**R.A. Ebrahim**  
**Judge**

**Dar Es Salaam**

**24.06.2020**