

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

MISC. CRIMINAL APPLICATION NO. 58 OF 2020

*(Originating from Economic Case No. 74 of 2017 in the Resident
Magistrates Court of Dar es salaam at Kisutu)*

MARTINE IKE APPLICANT

VERSUS

THE REPUBLIC (DPP) RESPONDENT

RULING

Date of Last Order: 28th Sept, 2020.

Date of Ruling: 30th Oct, 2020.

E. E. Kakolaki, J

In this application the applicant is seeking for bail pending completion of both committal proceedings and the trial of Economic Crime Case No. 71 of 2018 as well as imposition of favourable and reasonable bail conditions in accordance with the law. The application has been preferred under sections 29(4)(d) and 36(1) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002] and any other enabling provisions of the law. It is supported

by the affidavit sworn by the applicant one **Martine Ike**. The application is contested by the respondent.

Briefly before the Resident Magistrates Court of Dar es salaam at Kisutu the applicant is charged with an offence of Trafficking in Narcotic Drugs; Contrary to sections 1(3)(i) and 15(1) of the Drugs Control and Enforcement Act, No. 5 of 2015 herein to be referred as DCEA as amended by the Drug Control and Enforcement (Amendment) Act No. 15 of 2017 read together with section 60(2) and paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002] as amended by the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016 now [Cap. 200 R.E 2019]. It is alleged in that case that, the applicant being a resident of the United Republic of Tanzania, on 6th day of July, 2018 at Tahmeed bus Company office, Mwembe Tayari area in Mombasa county within Coast Region in the Republic of Kenya, was found in possession of narcotic drugs namely Heroin Hydrochloride weighing 647.7 grams. The charge was read to the applicant but could not be called upon to plead to as the court which he stands charged now is a committal court with no jurisdiction to entertain the case. And for that matter it has also no jurisdiction to entertain bail application hence the present application before this court.

When the matter came for hearing the applicant prayed the court to proceed with hearing through written submissions the prayer which was not contested by the respondent and finally granted by the court. Whereas the applicant who appeared unrepresented remotely from the prison under aid of video conference opted to proceed on his own, the respondent was enjoying the services of Mr. Salimu Msemo, learned State Attorney.

Submitting in support of his application the applicant contented that, the offence with which he stands charged with is bailable and this court has jurisdiction to grant him bail as provided under the provisions of section 29(3) of DCEA as amended and section 148(3) of the CPA. He said, firstly, the offence is bailable because as per the particulars of offence, the offence charged with is possession and not trafficking of narcotic drug. And further that, the investigation is incomplete and there is no proof of weight and the type of the alleged narcotic drug from the Government Chemist Laboratory which is mandated to so prove under section 29(2) of DCEA as amended.

Secondly, the applicant stated this court is enjoined to grant him bail as one year has passed since his indictment before the court. Reiterating on this point the applicant said, this Court derives powers to so do from the decision of **Zepherine Galeba and The Attorney General**, Misc. Civil Application No. 21 of 2013 (unreported) which has never been appealed against that stated at page 12, if no information is drawn against the applicant at the expiration of one year then he should be granted bail. He therefore invited the court to allow the application and grant him bail as prayed.

Contesting the application, Mr. Msemo for the respondent, prefaced his submission by stating that, applicant's submission on both two limbs of arguments is contested. On the first limb he said, the argument that the offence facing him is possession and not trafficking is devoid of merit and should not detain this court as section 2 of DCEA as amended in 2017 amended the definition of trafficking to include "*possessor*". So the offence facing him is equally "Trafficking" and not possession. On the second limb concerning the case of **Zepherine Galeba** (supra) relied on by the applicant

to beef up his argument, he submitted, the same was referring to discussion on committal proceedings issues by subordinate courts and never discussed the issue of denial or provision of bail visa vis the Drug Control and Enforcement Act, No. 5 of 2015 and amended. Thus the said case is inapplicable in the circumstances of this case, Mr. Msemo contended. He had it that, the basis for objection of the applicant's bail is the nature of the offence facing him which is trafficking of narcotic drug which the law restricts grant of bail to. To support his stance he cited to the court a number of cases. These are **DPP Vs. Bashiri waziri and Mugesu Anthony**, Criminal Appeal No. 168 of 2012 where the Court of Appeal held that doors to bail are closed if the applicant is facing a charge of Trafficking in drugs, **Omari Said Mtangi Vs. R**, Misc. Economic Cause No. 24 of 2018 (HC-unreported), **Haji Mwalami Mkumba and Another Vs. R**, Misc. Criminal Application No. 104 of 2020 (HC-Unreported) and **Minda Mussa Mfamau and 2 Others Vs. R**, Misc. Economic Cause No. 01 of 2018 (HC-unreported). With these authorities he submitted, even when the word possession is used in the charge sheet still the offence remains to be trafficking under the definition of "trafficking" in section 2 of DCEA as amended and weight of the substance the applicant was found in possession with is also another mandatory consideration factor before bail is granted. He therefore implored the court to dismiss the application for want of merit.

In his rejoinder submission the applicant reiterated what he had stated in his submission in chief and added that, it is true that the offence of Trafficking in Narcotic Drugs is unbailable as provided in the case of **Bashiri Waziri** (supra), but the situation in the present matter is different as the alleged drugs are yet to be proved to be real and its weight is unestablished for non-

provision of the Government Chemist Laboratory Report and further that the matter is still pending investigation. He therefore insisted this court can grant him bail and prayed it to so do.

I have dispassionately considered rival submissions from both parties. The issue for determination before the Court is whether the applicant is entitled to bail or not. While the applicant is saying is entitled to bail because the particulars of offence disclose the offence of possession and not trafficking, the respondent is of the contrary view that the offence is trafficking as possession is included in the definition of the term trafficking as provided under section 2 of DCEA as amended in 2017. As rightly submitted by Mr. Msemo for the respondent, it is true and I agree with him that, possession is one of the acts that constitute the offence of trafficking if perpetrated by any party. Section 2 of DCEA as amended by the Drug Control and Enforcement (Amendment) Act No. 15 of 2017 is very categorical and defines the term *"Trafficking"* thus:

*"trafficking" means 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 supplied)

There is no dispute that the particulars of the offence in the charge sheet shows the applicant was found in possession of narcotic drugs namely Heroin Hydrochloride weighing 647.7 grams. The inclusion of the word possession

therein does not mean the offence is possession but rather "trafficking" as that offence of possession ceased to exist after the amendments of 2017. This was also the finding of this court in the case of **Haji Mwalami Mkumba and Another** (supra) when discussing on the definition of the term "trafficking" when faced with similar situation, where it observed:

*"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 restriction of bail depending on the weight."* (emphasis supplied)

For the foregoing reasons I shoulder up with Mr. Msemo's submission that possession is not an independent offence and proceed to dismiss the applicant's contention that the act of possession constitutes an independent offence and it does not mean trafficking.

That aside, the applicant also contended that, he is entitled to bail because the type and weight of the alleged narcotic drug is not established through Government Chemist Laboratory Report as provided by section 29(2) of DCEA as amended. This point was not countered by the respondent. It is true as submitted by the applicant that there is no Government Chemist Laboratory Report tendered or annexed to the submission by the respondent. However, this being the application for bail does not require proof of the charge by tendering evidence as the applicant would want this court to believe. I say so because the law under section 29(1)(a) of DCEA as amended does not require proof of charge by evidence when entertaining

bail application. To bolster this finding of the court it is instructive that I quote the said provision:

29.-(1) A police officer in charge of a police station or an officer of the Authority or a court before which an accused is brought or appear shall not admit the accused person to bail if-

*(a) **that accused is charged of an offence involving trafficking** of Amphetamine Type Stimulant (ATS), **heroin**, cocaine, mandrax, morphine, ecstasy, cannabis resin, prepared opium and any other manufactured drug weighing twenty grammes or more; (emphasis supplied).*

Since the applicant is charged of the offence involving **Trafficking in Narcotic Drug** namely **Heroin weighing 647.7** grams, I hold is enough for the purposes of this application to determine whether the applicant is entitled to bail or not without further proof of the type and weight of the drug as the applicant would want it to be.

This court in the case of **Omari Said Mtangi** (supra) in a similar situation and when discussing the application of the above cited provision had this to say:

"... it should be born in mind that the imported provisions address where the accused is charged of an offence, and it does not require that the charges be proved, for an accused not to be admitted to bail. Therefore, this court finds its hands are tied by the above provisions, in view of the charges facing the applicant and particulars thereto as specified therein."

Having so found, I now turn to the second limb of applicant's argument. It is the applicant's submission that as per the case of **Zepherine Galeba** (supra) once one year has passed without any information being filed in the High Court against the accused, then he is entitled to bail automatically. And further that, this court should consider him for bail under section 29(3) of DCEA as amended and section 148(3) of the CPA, as one year has already passed without being committed to the High Court. Mr. Msemo for the respondent, is opposing that submission charging that there is nowhere in the cited case the issue of granting bail to accused person is discussed apart from the issue of committal proceedings, hence the case is inapplicable in this matter. I am at one with Mr. Msemo on this point that, the issue of granting bail to the accused spent more than one year in subordinate court without any information being filed against him was never canvassed and decided on in the said case. What was at discussion is the issue on whether committal proceedings in subordinate courts in matters triable by the High Court are unconstitutional. Thus I hold the case cited by the applicant is inapplicable in the circumstances of this court. Similarly with regard to the application of the provision of section 148(3) of CPA in bail applications to offences under Economic and Organised Crime Control Act, [Cap. 200 R.E 2019] herein referred to as EOCCA, I am of the finding the provision does not apply to cases preferred under EOCCA.

Lastly is the prayer for bail consideration by the applicant and reasonable conditions as provided under sections 29(1) and 29(3) of DCEA as amended. Under section 29(1) of the DCEA as amended weight of the drug which the applicant is being accused to have trafficked is the major determinant factor for bail consideration. With the amendment of 2017 the position is that

where the drug involved is a processed drug such as heroin or cocaine weighing twenty (20) grams or more then bail is restricted to the accused person. The same is the position to the prohibited plants such as khat or cannabis when the weight is twenty (20) kilograms or more whereas for the precursor chemicals is when the chemicals are thirty (30) litres or kilograms or more for liquid and solid chemicals respectively. In this matter the applicant is accused of being found in possession of heroin weighing 647.7 grams which is far beyond the weight limitation provided by the law. For that reason I hold, this court is restricted by law from granting the applicant bail. It is for the same reasons the provisions of section 29(3) of DCEA on the reasonable condition cannot come into play.

In the circumstances and for the foregoing reasons, I would conclude as I hereby do that this application lacks merit and is hereby dismissed.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of October, 2020.




E.E. KAKOLAKI

JUDGE

30/10/2020

Ruling delivered today 30th day of October, 2020 by the Deputy Registrar, in the presence of the applicant appearing from prison through video

conference and Ms. Monica Msuya, Court clerk and in the absence of the Respondent.

Right of Appeal explained.



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DEPUTY REGISTRAR

30/10/2020

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
DAR-ES-SALAAM ZONE