

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

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CRIMINAL APPLICATION NO.5 OF 2020**

(Arising from Criminal Session Case No. 43 of 2016 filed in the High Court of Tanzania  
at Dar Es Salaam)

**1. David Fulgence Mchuma** ..... **APPLICANT**

**VERSUS**

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

**RULING**

*Date of Last Order: 02.03.2020*

*Date of Ruling: 06.03.2020*

**Ebrahim, J:**

The applicant has filed the instant application praying for bail pending trial. The application is made under **Section 148(1) of the Criminal Procedure Act, Cap 20 RE 2002**. The chamber application is supported by an affidavit of David Fulgence Mchuma, the applicant.

Brief background of this application could be discerned from the charge sheet filed in the court file that the applicant was initially charged in 2014 at the Resident Magistrate Court of Kibaha at Kibaha vide PI Case No. 3 of 2014. He was then committed for Trial at the High of Tanzania on 4<sup>th</sup> May 2016 on Criminal Sessions Case No. 43 of 2016. The applicant is charged 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 No. 9 of 1995 as amended by Act No. 2 of 2012( The Act).**

It is alleged that the applicant had on 28<sup>th</sup> day of March 2014 at Mlandizi area within Kibaha District in Coast Region, trafficked 38.37kgs of Narcotic Drugs namely Cannabis Sativa commonly known as Bhang valued at TZS 3,837,000/-.

At the hearing of this application, the applicant appeared in person, unrepresented; and the Republic was represented by Ms. Deborah Mcharo, learned State Attorney.

The applicant adopted his affidavit in support of the application. He explained to the court that he was charged in 2014 therefore all the

amendments in respect of the charged offence would not affect his application. He stated that he prays for bail under **Section 27(1)(b) of the Act** and **Article 13(6)(c) of the Constitution**. To cement his argument he cited the case of **Mussa Makota Versus The Republic**, Miscellaneous Criminal Application No. 214 of 2019 where this Court granted bail in terms of **Section 27(1)(b) of the Act**.

Counsel for the Respondent - Republic, Ms. Deborah Mcharo resisted the bail application. She contended that the applicant committed the offence in 2014 and charged under the provisions of **Section 16(1)(b) of the Act as amended by Act No.2 of 2012**. She contended further that under the provision of which the applicant was charged with, there is no bail. She added also that even under **Section 148(5)(a)(ii) of the Criminal Procedure Act**, the offence is unbailable. She challenged the attempt by the applicant of wanting to be granted bail under the new law which does not act retrospectively.

In brief rejoinder the applicant referred to **Section 27(2) of the Act No.9 of 1995** which recognises Criminal Procedure Act and argued that the same should not be used in isolation.

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 prevailing laws.

Indisputably is the fact that the applicant was charged in 2014 therefore the applicable law was **Drugs and Prevention of Illicit Traffic in Drugs Act No.9 of 1995 as amended by Act No. 2 of 2012**. He was charged under **Section 16(1)(b) of Act No.9 of 1995**. The said provision of the law reads:

*"16.(1) Any person who-*

*(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable- ..."* (Emphasis is mine)

The main ingredient of the offence here is **trafficking of the narcotic drugs**.

On the other hand **Section 27(1)(b) of the Act** which has been heavily relied by the applicant caters for the offence involving possession and other circumstances of the narcotic substances and all other listed substances which the provision of bail is applicable where the value of the subject matter does not exceed 10 million shillings. However it **does not**

**cater for the offence of trafficking.** In terms of **Section 27(1)(a) of the Act** read together with **Section 148 (5)(a)(ii) of the Criminal Procedure Act, Cap 20 RE 2002,** the offence of **trafficking in narcotic drugs** under which the applicant was charged with is not bailable. The section read:

"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–*

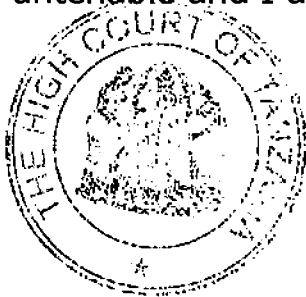
(a) *that person is accused of an offence **involving trafficking in drugs, narcotics or "psychotropic substances"** but does not include a person charged for an offence of being in possession of drugs which taking into account all circumstances in which the offence was committed, was not meant for conveyance or commercial purpose"*  
(emphasis is mine).

The applicant has relied heavily on **Article 13(6)(c) of the Constitution of the United Republic of Tanzania, 1977** which calls for none punishment of the offence which at the commission was not an offence under the law. However, the Article does not save the applicant because of the type of the offence alleged to have been committed and the law applicable when the offence was committed, bail was restricted by

the law – see the case of **The DPP V Bashiri Waziri and Another**, Criminal Appeal No. 168 of 2012 ( Court of Appeal – Unreported). In the same vein the law does not apply retrospectively. That being the position, the emerged amendments on the provision of bail on the offence that the applicant was charged would not apply to the applicant.

The applicant referred the court to the case of **Mussa Makota (supra)**. I refrain from commenting on cited case but I am of the views that the position in the cited case does not apply to the instant case.

It is on that background that I find that the applicant’s application for bail is untenable and I accordingly dismiss it.



A handwritten signature in black ink, appearing to read "R.A. Ebrahim", written in a cursive style.

**R.A. Ebrahim**

**Judge**

**Dar Es Salaam**

**10.03.2020**