

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

**MISC. CRIMINAL APPLICATION NOs. 162 & 94 OF 2021**

*(Originating from High Court of Tanzania, District Registry at Dar es Salaam in  
Criminal Session No. 94 of 2017)*

<b>ABAS NASORO -----</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>SAID ATHUMAN SAID -----</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>SIMON JEROME -----</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>DANIEL YONAZA -----</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>SAI ELIA -----</b>	<b>5<sup>TH</sup> APPLICANT</b>

***VERSUS***

**DIRECTOR OF PUBLIC PROSECUTIONS --- RESPONDENT**

***Date of Last Order: 11/10/2021***

***Date of Ruling: 15/10/2021***

**R U L I N G**

**MGONYA, J.**

Before me is a Consolidated Application from **MISC. CRIMINAL APPLICATIONS NOs. 162 AND 94 OF 2021** respectively both originating from **Criminal Session No. 94 of 2017** pending at the High Court of Tanzania in Dar es Salaam Registry. The same is brought via Chamber Summons and supported by Affidavits sworn and affirmed by the

Applicants herein namely **ABAS NASORO, SAID ATHUMAN SAID, SIMON JEROME, DANIEL YONAZA** and **SAI ELIA**. The Application has been made under the provisions of **Articles 13 (6) (b) and 15 of the Constitution of the United Republic of Tanzania (1977), section 148 (5) (a) (iii) and Section 392A of the Criminal Procedure Act, Cap. 20 [R.E. 2019]; and Section 27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 [R.E. 2002] as amended by Written Laws (Miscellaneous Amendment) (No. 2) Act No. 6 of 2012.**

The gist of the instant Applications as well submitted by the Applicants themselves is for this Honorable Court to grant the Applicants bail pending hearing of the **Criminal Session No. 94 of 2017** pending in this High Court of Tanzania in Dar es Salaam Registry.

Submitting for the Application, all the Applicants apart from praying their Affidavits be adopted, were of the prayer that they be granted bail pending hearing of their Criminal Session before this Honorable Court. Cementing on their prayers, it was the concern of all the Applicants herein that bail is their Constitutional right as they are presumed innocent until proven guilty. Further it is their concern that they have been in remand prison for long, **from 2014 to date**. Hence they are still waiting for their case to be heard. On the other hand, that

since the total value of their substance in respect of the offence charged is **Tshs. 8,338,000/=** of which do not exceed **10 Million Shillings** as per **section 27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act (supra)**. Under those reasons, they pray this court to consider them for bail on the conditions that will be set to them judiciously of which they will comply accordingly.

From the above submissions, Applicants prayed for the interest of justice that this Application be granted.

Responding to the Application, **Ms. Kasana Maziku** the learned Senior State Attorney pronounced before the Court that the Respondent, the Republic herein is objecting the Application. It is from that stand, Ms. Maziku stating the reason of objecting the Application said, the section of which has been used to sue the Applicants, **section 16(1) (b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 [R. E. 2002]** as amended by **Written Laws (Miscellaneous Amendment) (No. 2) Act No. 6 of 2012**, is objecting the Applicants right to bail.

Submitting further it is the Counsel's assertion that likewise, **section 148 (5) (a) (ii) of the CPA, Cap. 20 [R.E. 2019]** and **section 27 (1) (a) of Cap. 95 (Supra)** denies Applicants bail for the offence charged. Submitting further, it is the Counsel's admission that despite the fact that the

substances in question do not exceed **Tshs. 10 Million**, being **Tshs. 8,338,000/=**, as the offence charged involves **Trafficking**, then Applicants are not eligible for bail.

Supporting this stand, Ms. Edith Mauya cited the case of the ***DPP VS BASHIRI WAZIRI & MUGESI ANTHONY, Criminal Appeal No. 168 of 2012*** at Mwanza where section **16 (1) (b) (i) of Cap. 95** has been cited and narrated especially in the issue of Trafficking.

In the event therefore, Respondent's Counsel prayed the Application be dismissed for the above stated reasons.

From the records and particularly from the Applicants themselves, it came to the knowledge of this honorable court that the Applicants herein were apprehended on **28<sup>th</sup> March 2014**. However, in **2017** they were released after the DPP had entered ***Nolle Prosequere***, but ultimately, they were rearrested and the fresh Charge which read 2017 was instituted against them, which led to the Criminal Session No. 94 of 2017 before this Registry.

Further it came to the knowledge of this Honourable Court that the substances in issue is *khat (Catha edulis)* weighing **166.76 Kgs** valued at **Tshs. 8,338,000/=**.

In the cause of determining this Application, I have gone through the enabling laws in respect of this Application being the provisions of **Articles 13 (6) (b) and 15 of the**

**Constitution of the United Republic of Tanzania (1977), section 148 (5) (a) (iii) and Section 392A of the Criminal Procedure Act, Cap. 20 (R.E. 2019); and Section 27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 [R. E. 2002] as amended by Written Laws (Miscellaneous Amendment) (No. 2) Act No. 6 of 2012.**

As the Constitution is the Mother of all Laws, then I have preferred to start analyzing the provisions under the Constitution as presented by the Applicants in respect of their bail Application. Indeed, Bail is considered as a right under **Article 15 (1) of the Constitution of the United Republic of Tanzania (1977)**. The same provides:

***"Every person has the right to freedom and to live as a free person."***

It is a legal factor that a party to Criminal case once arrested is kept in custody until when one is released under bail after fulfilling some bail conditions set by the Court. This is provided for under **section 225 (1) of Criminal Procedure Act Cap. [20 R.E. 2019]**. It is a principle under the provision of the Constitution that those who have this right ought to be treated fairly and equally without any favour nor segregation. It is the culture of our jurisdiction that there is existing the

principle of equality of all humans before the law. The same is enshrined under **Article 12 of the Constitution (Supra)**.

Before this Court is an Application for bail. As said earlier, the record from the court and from Applicant's submissions reveals that the Applicants have been in custody since 2014.

Bail is generally defined to mean, "**temporary release of an accused person upon certain conditions pending the finalization of Court proceedings.**" It is therefore in the circumstances an Application such as the one at hand, bail conditions are set by Court and once the person seeking bail fulfils or meets the bail conditions is hence **temporary released** and required to attend to Court until Court proceedings come to an end.

Further, bail under all situations is considered to be a right of the person whose liberty is at stake pending due process of the law. Bail being a right before the eyes of law should not be in any way denied in the absence of **sufficient reasons** especially when the offence is **bailable** and the person seeking bail before the eyes of law is eligible to be bailed out.

As rightly heard by the learned State Attorneys, in accordance to the law, the Applicants are charged with Trafficking of *khat (Catha edulis)* weighing 166.76 Kgs valued at **Tshs. 8,338,000/=**, hence they are not eligible to bail.

In determining this Application, despite of the concerned law, I have warned myself and also consider this application in many factors in accordance to its nature. The Applicants being in custody since **2014** is vividly proving that their liberty has been curtailed for more than **7 years**. The Applicants offence being **unbailable** as it has been submitted by the Republic, then I have seen it fair to revisit the provisions of section **27 (1) (b)** as referred by the Applicants in moving this court. The same states:

***(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-***

***(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.***

Referring back to the Applicants' substances in issue, in respect of value, the same stands at **Tshs. 8,338,000/=**. This is below **10 Million Shillings**. However, it has been submitted that, regardless the amount, if the offence is **Trafficking**, then the offence is **unbailable**.

At this stage then it is my firm view that, the laws must not be used in **discrimination**. I am concerned that, when the Legislature passed the concerned law with the wording of "*exceeding ten Million Shillings*", it was meant and the same ought not to be altered as the Legislature has weighed and considered the amount less than **10 Million Shillings** can be bailable under the circumstances. If the amount has been stated by law, then the same has to be adhered to and that the law cannot be read in isolation.

I am of the view that when it comes to serious issues such as this, where a person is placed in remand prison for **more than seven years** for the offence of less than **10 Million Tanzania Shillings, unheard, and still the time of litigation is uncertain, as the same is out of the accused's control**, then it is time now that **justice must not only be done but must be seen to be done as we have always been preaching**. Of recent, I have witnessed a number of Applicants appearing before the Court for bail Applications such as this one. And most of the amounts



involved are **massive**. However, they have been eligible for bail after the said "escape" or rather expunged counts on Money Laundering in their respective Charge Sheets.

Taking the instant Applications in comparison of what I have stated above, it is fair to look with the different eye and reality the Applicants charge which attached the total sum of **Tshs. 8,338,800/=** being not only less than **10 Million Shillings** but also in comparison, is a less amount to deny bail after being in remand for more than seven years.

I have taken this matter seriously in connection with **Article 13 (1) (6) (b) of the Constitution (Supra)** which states; **All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.** Further, to ensure equality before the law, the State Authorities involved in investigation and litigations are obliged to make procedures which are appropriate or which can take into account the following principle being:

***"person charged with a Criminal offence shall not be treated as guilty of the offence until proven guilty of that offence."***

In conceptualizing **the Concept of Justice**, Judge Crampton once stated: *"The courts in which we sit is a temple of justice and we-members of the legal profession – Bench and*

*Bar alike are equally ministers in that sacred temple.”* (This was quoted in Oputa, C. J. (1981): ***The Law and the Twin Pillars of Justice, Owerri: Government Printer, at p.79***).

He went on to say that the object of all lawyers should be the attainment of justice. But, as such agencies of the Rule of Law and justice, lawyers should pursue a kind of justice which will no longer be the “static justice” as set out in statutes, but a justice which “transcends” the law courts and finds finer expression in restoring and upholding the dignity of man everywhere.

There is no doubt that this is partly to blame our own systems of which is low standing in the eyes of some members of the Public. In this regard, it is pertinent to recall the succinct words of James Read in his book **“The second for Justice in Morris H. F. and Read, J. S. 1972”** when he said:

*“May there perhaps be a danger in the oft-repeated principle - **justice must not only be done but must clearly be seen to be done**: Emphasis upon the latter part of the principle may be at the expense of the former, and the appearance of justice may be mistaken for the reality.”*

**“Justice”** is, perhaps, a term more easily recognisable than definable. Justice Oputa in his book **“The Law and the Twin**

**Pillars of Justice, Oweni Government Printer, at 1981 at pg 71** described Justice as follows:

*"Justice should be pure, visibly pure, and unadulterated. **It should be fair, equitable and impartial.** It should be no respecter of persons, personalities, or establishments. It should not be commercialised, nor should it be bought and sold, for nothing is as hateful as venal justice. **It should be quick, for delay is certain denial.** Legal justice should as closely as possible, resemble the virtue whose name it bears-virtue by which we give to everyone his due."*

On one hand, there are those who contend that justice is not always achievable in cases where the law is strictly applied, such as to the instant Applications before this Honourable Court. Hon. Justice Francis Nyalali, Tanzania's Chief Justice by then, once said, "**The law and justice** are not only *capable* of being achieved *simultaneously*, but they are *inseparable*". This was stated by Nyalali, F. L. CJ, (1994): "***The changing role of the Tanzania Bar***", ***Speech delivered at the Admission Ceremony of New Advocates, Dar es Salaam, 15<sup>th</sup> December, 1993, and published in The Lawyer, Tanzania, September – December, 1994, at p.4.*** In that speech Hon. Nyalali, argues that **there is no reason why a**

**Judge should not administer justice-in every situation and that true Law can never be in conflict with justice.**

The Chief Justice appears to be urging for a more vigorous invocation of the rules of equity and natural Justice.

It is my firm observation that, to prevent a miscarriage of Justice, the Judge must seek to secure to the utmost the rights of the litigants before him/her. On this one may wish to see, ***Samatta, J.K's ruling in Mwalimu Paul Muhozya vs The Attorney General, Civil Case No. 206 of 1993, H.C.T, Dar es Salaam***, especially at pp. 3 - 4 of the typed ruling. In this ruling, it was further stated that, unfortunately, this has not always been the case, even when the courts themselves feel the clear injustice of a procedural rule.

From the above provisions of law, it is my firm view that, since the Applicants are also the **Citizens** of this Country and who are served with this very Constitution, then, Bail should be taken to be more of a right than a privilege whenever chances do allow for the same to be granted to one who seeks the same. This is because our systems do not provide prompt litigations regardless the offence at hand being less than ten Million Shillings, but the hindarence to their Application is said to be Trafficking of which I have decided under the above reasoning to find Justice over weighing the same.

After going through the Applicant's Affidavit and Charge Sheet attached thereto, together with their respective submissions and that of my learned State Attorneys, and my own analysis and determination in relation to the instant Application, this Honorable Court is satisfied that the Applicant before the court are eligible for bail as prayed.

In the event therefore, **this Honorable Court judiciously and for the interest of Justice, proceeds to grant the Applications sought by releasing the Applicants on bail** upon fulfillment of the following conditions as hereunder:

- (i) To weigh the scale taken into consideration of the offence charged, each of the Applicants is to deposit into Court a cash sum of Tshs. 50,000,000/= (Fifty Million Shillings) or in Alternative, to deposit into a court Title Deed/(s) of immovable property (duly certified by the professional valuer) equivalent to the above mentioned sum;***
- (ii) Each of the Applicants is to surrender her travelling document(s) i.e. passport if any to the nearest Police Station within the Jurisdiction where the charge arose;***

***(iii) Each of the Applicants is hereby ordered to have two reliable sureties; and***

***(iv) Further, the Applicants herein are restricted from travelling and visiting any place outside the Dar es Salaam Region without express written permission of the Court.***

Consequently, the Applications in favor of the above mentioned Applicants are **granted to the extent, terms and conditions stipulated above.**

It is so ordered.

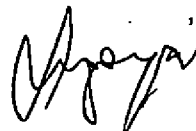


**L. E. MGONYA**

**JUDGE**

**15/10/2021**

**Court:** Ruling delivered in my chambers in the presence of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants in persons, Miss. Edith Mauya, Advocate and Ms. Veronica RMA, this 15<sup>th</sup> day of October, 2021.



**L. E. MGONYA**

**JUDGE**

**15/10/2021**