

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

MISC. CRIMINAL APPLICATION NO. 29 OF 2021

ALLY MUSTAPHA MZEE ----- 1ST APPELLANT

IDD SAID RASHID -----2ND APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

Date of Last Order: 03/06/2021

Date of Judgment: 26/07/2021

RULING

MGONYA, J.

The Applicants before the court have brought instant Application through the Chamber Summons and attached with their respective Affidavits. In principle, the Application before the court is for this court to consider the grant of bail to the Applicants herein pending hearing and determination of the **Criminal Case No. 91 of 2013** scheduled as **Criminal Session Case No. 42 of 2016** pending in the High Court of Tanzania, Dar es Salaam District Registry.

When the matter was called for hearing, through the virtual court video system, both Applicants appeared and urged their Application in person, while the Respondent, Republic herein, was represented by the learned Counsel **Ms. Mkunde**.

Submitting for the Application, both Applicants informed the court that the matter before the court started in 2011 at Morogoro where later it was withdrawn via ***NOLE PROSEQUE*** and later refile and as of now, they are in remand for almost ten (10) years. The Applicants further prayed the court to grant them bail as prayed as the bail is said to be their constitution right.

Submitting further, it is Applicants' concern that if one revisits their respective Charge Sheet, the section cited for the offence done is of **16 (1) (B) (ii)** of which is a non-existed section where as the correct one is section **6 (1) (b) (i)**. In the event therefore, it is the Applicants' concern that they are not properly sued.

Further, it is the Applicants' concern that the kind of narcotic drugs that they are sued with is not in the Act. They said, going through the particulars of offence it demonstrates that the Applicants has been caught with 300 Kgs of **cannabis sativa commonly known as bhangi**. However, after they have visited the Act to the charge **Cap. 95 [R.E 2002]** and 1st Schedule of Narcotic Drugs, were they have failed to tress the said kind of Narcotic and that there is only Cannabis Narcotic/Cannabis of (Indian Herb and Cannabis Racine – Racine of Indian Herb).

It is from those shortcomings, Applicant prayed the court to consider their bail application.

Responding to the Applicants' submission, **Ms. Mkunde, the learned State Attorney** objected the Application as she also prayed the court to adopt the Counter Affidavit they have filed in court to form part of this court's record.

Ms. Mkunde informed the court that the reason of objecting the Application is that the 2nd count in the Charge Sheet is not bailable; under **section 148 (5) (a) (ii) of Cap. 20 [R.E 2019] the Criminal Procedure Act** as the Applicants are sued for the offence of Illicit in drugs, the offence which has no **BAIL**.

In support of this stand, the learned State Attorney cited the decision of Court of Appeal of Tanzania where this stand has been stated explicitly; the case of the ***DPP vs BASHIRI WAZIRI AND MUGESI ANTONY, Criminal Appeal No. 168 of 2012***; where in pg. 21 of the said case, the court stated that BAIL is the right and denying bail taking away that right only if the law has stated so. And that they have detected **section 148 (5) of CPA** had denied bail in some offences. In the event therefore, as the above section has denied bail in offence of Narcotic Drugs, then it is their concern that **BAIL is AUTOMATICALLY CLOSED**.

On Applicants' observation in the Charge Sheet and their submissions pointing out the sections' variance, it is Ms. Mkunde's submission that, Application before the court is on bail and that this court has not been moved on determining the legality of the Charge Sheet.

Further if that is the issue then, the same can be determined later at proper time and form; and not under the instant Application.

Concluding her submission, the learned State Attorney prayed the court to dismiss the instant Application as the same is said to be baseless.

I have heard both sides' respective submissions for and against the bail application. It is my knowledge that as per section **29 (4) (d) of the Economic and Organized Crime Control Act, Cap. 200 [R.E 2019]** mandates the High Court to grant bail where value of the charge exceeds **10 Million Tshs**. Under those circumstances, as the Applicants have been charged under the Drugs Control Act and prays to be granted with bail with reasonable bail conditions.

What is provided by the law under the circumstances? From the record, the Applicants has been charged with transporting drugs "**bhangi**" **Kgs. 300** valued at **Tshs. 30,000,000/=**. Referring to the **Drugs Control and**

Enforcement Act, section 29 (1) (b) which has been amended, the accused will only be granted bail if the weight of the substance is below **20 Kgs**. The fact that Applicants have been charged for **300 Kgs** of drugs, it is fact that bail cannot be granted. As to the costs of the substance, the same has been estimated at **Tshs. 30,000,000/=** as clearly indicated in the Applicants' Charge Sheet.

I am well aware that **Article 13 (6) (b)** of the **Constitution of the United Republic of Tanzania [1977]**, provides that no person charged with a criminal offence shall be treated as guilty of the offence until proved otherwise by a court of competent jurisdiction. In giving effect to this Constitutional principle, Parliament has enacted various pieces of Legislation to address the issue. These pieces of Legislations include the **Criminal Procedure Act, Cap. 20 [R.E. 2019]** of which as indicated above, has declared no bail under the Applicants' situation for the reason stated above.


As to the Applicants' concern on the wrong section on the Charge Sheet and also the non-existed drugs that have been indicated under the said Charge Sheet, I have decided not to determine those facts as they are not part of the bail Application not pleaded by the Applicants. However, it is my firm view that those matters can be determined in the cause of

hearing the main case or by filing proper application addressing those issues in the legal provided mechanism.

It is for that legal reasoning, I proceed to deny the Applicants' bail Application and proceed to declare that the **Application before the court is dismissed in its entirety.**

I make no order as to costs.

It is so ordered.

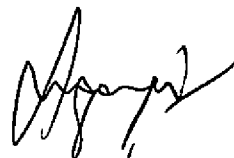


L. E MGONYA

JUDGE

26/07/2021

Court: Ruling delivered in my chambers in the presence of both Applicants via Virtual Court, Ms. Edith Mauya, learned State Attorney and Ms. Veronica, RMA this 26th day of July, 2021.



L. E MGONYA

JUDGE

26/07/2021