

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

MISC. CRIMINAL APPLICATION NO.30 OF 2022

*(Originating from District Court of Masasi at Masasi in Economic Case
No.4 of 2022)*

ASINA MASTANI MUSSA NGULUKURU..... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 27/7/2022

Date of Ruling: 17/8/2022

LALTAIKA, J.:

The applicant **ASINA MASTANI MUSSA NGULUKURU**, is charged before the District Court of Masasi in Economic Case No.4 of 2022. It is alleged that the applicant was found in unlawful possession of narcotic drugs contrary to section 15(1)(a)(c) and (2) of the Drugs Control and Enforcement [Cap. 95 R.E. 2019] as amended by the Written Laws (Miscellaneous Amendments) read together with section 57(1) and paragraph 23 of the first schedule of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019].

The applicant has moved this court to admit her to bail pending determination of the main case. Her application is predicated on Article 13(6)(b) and 15 of the Constitution of the United Republic of Tanzania (as amended from time to time), section 148(3)(5)(a)(ii) and (iii) of the Criminal Procedure Act [Cap. 20 R.E. 2019] now the R.E. 2022 and any other enabling provisions of the law. Pursuant to these sections, the applicant's application is also supported by his affirmed affidavit. The respondent Republic, likewise, filed her counter affidavit sworn by Mr. Enosh Gabriel Kigoryo, learned State Attorney.

When this matter came on for hearing on 27/7/2022 the applicant appeared in person, unrepresented. Whereas, the respondent was represented by Mr. Enosh Kigoryo, learned State Attorney. Submitting for the application, the applicant submitted that she is being held in prison remand pending determination of her case at Masasi District Court. She further stressed that it is on illegal possession of bhangī. The applicant contended that bhangī is not her but belonged to her husband who run away afterwards.

The applicant went on and submitted that she prays for bail because has school going children and there is no one taking care of them since her husband had run away. It is the applicant's submission further that

her own father **Mustani Musa Ngulukuru** is sick. Thus, she argued that she needs to go and see them since has no any other relative.

More ever, the applicant averred that her children probably are scattered now and did not know their situation as to now. She insisted that she can still attend the case when will be out since her homestead which is situated at Chanika in Masasi town is not far from the District Court of Masasi.

In reply, Mr. Kigoryo at the outset objected the application and added that has filed a counter affidavit to that effect. The learned State Attorney prayed this court to adopt the contents of the counter affidavit to form part of his submission. Mr. Kigoryo went further and argued that it is not apparent in the applicant's application whether it is true that she is charged with the offence she mentioned in paragraph 2 of the affidavit. He stressed that the proof must come from the charge sheet. The learned State Attorney insisted that it was the applicant's obligation to attach a charge sheet. To this end, the learned State Attorney argued that for drug related offences, bail is determined by the weight of the drugs. Mr. Kigoryo insisted that weight of drugs tells if the offence isailable or unailable.

Furthermore, the learned State Attorney submitted that as per section 29 of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] any

trafficking of narcotic drugs from 20 kilograms onwards does not qualify for admission to bail. Mr. Kigoryo contended that the section is coached in mandatory manner. To this end, the learned State Attorney argued that inability to attach a copy of the charge sheet makes it difficult for this court to determine its jurisdiction. He thus, prayed this court to dismiss the application. In addition, the learned State Attorney stressed that in Chamber Summons applicant has not indicated that the court is empowered to grant such application. Mr. Kigoryo maintained that all economic related offences are governed by the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019].

A very brief rejoinder, the applicant submitted that it is her first time to argue a matter in court thus she does not know what else to say. The applicant insisted that was never told about the weight of bhangi found with her. However, the applicant stressed that was arrested with thirteen (13) synthetic bags. The applicant went on and argued that she is in custody since February, 2022 and only experienced normal fever. In line of that submission, the applicant further argued that nobody has come to see him since was arrested.

More so, the applicant submitted that has neither have a brother nor sister. However, the applicant stressed that her relatives are only her children. She went further and submitted that she has seven children in

total although one has passed away. The applicant stressed that she got married to Mohamed Bakari and have four children and her eldest child is called Sharifu Mohamedi born in 1985. The insisted that her eldest child is a farmer though she does not have a phone number.

Having studied the Chamber Summons and its affidavit in support of the application, counter affidavit and submissions for and against the application. I am of the settled mind that, the only issue for determination is whether the application has the merits or not.

From the very beginning, bail is a constitutional right to every citizen and non-citizens in our country. This spirit is built under the well-known and cherished principle of human rights that every person is entitled presumption of innocence and freedom of movement unless otherwise proved by the competent court or authority to be guilty of the offence he was facing. In our country, this principle has been given its paramount importance under Articles 13(6) (b) and 14 of the of the Constitution of the United Republic of Tanzania.

However, I should state that not all offences areailable in our jurisdiction and even in other jurisdictions especially to those countries which are seen and known as the best observers and implementors of human rights. Of course, this proves how a country protects the rule of law and good governance to its criminal justice system. Being aailable

or unailable offence for bail pending trial depends on the kind of the offence a person is charge with. In our country (The United Republic of Tanzania) bail pending trials is grantable upon the nature and weight of the offence someone if facing in court.

As I intimated earlier that applicant is facing an offence of unlawful possession of narcotic drugs before the District Court of Masasi. Therefore, with respect, the offence facing the applicant is controlled by two laws as herein above appears. In fact, the nature of the offence the applicant is facing is one of the criteria in determining her bail. However, the second criterial which shall determine her application depends on the amount of bhangji found in her possession.

In the present case, the particulars of the offence provides that the applicant was arrested while found in unlawful possession of narcotic drugs to wit 181 kilograms of cannabis sativa or bhangji. Based on the given particulars from the charge annexed in the affirmed affidavit of the applicant the amount of 181 kilograms of cannabis sativa or bhangji found in her possession is notailable. This position is backed up with the dictates of the provision of section 29(1)(b) of the Drugs Control and Enforcement Act which regulates admission of bail to the accused persons brought in court. For the interest of justice, it is important to reproduce it and it is as follows: -

"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) N/A

(b) that accused is charged of an offence involving trafficking of **cannabis**, khat and any other prohibited plant **weighing twenty kilogram or more;**" (Bold for my emphasis)

As the above excerpt of the provision of the law provides, it is clear that the bail pending trial for an accused who has been charged with the offence of drugs trafficking weighing twenty kilograms or more cannot be admitted to bail. The applicant's affidavit has appended a copy of the charge sheet which reads: -

"ASINA MASTANI MUSSA NGULUKURU charged on 13th day of February 2022 at or about 00:30 Hrs at Mbangala Village within Masasi District in Mtwara region was found in unlawfully possession of Narcotic Drugs to wit 181 Kg of cannabis sativa known as Bhangi."

At this juncture, I find it crucial to clear a doubt between the word used in the referred provision of the law and phrase featuring the particulars of the offence of the charge sheet annexed to the applicant's affidavit. Surely, section 29(1)(b) of the Drugs Control and Enforcement Act features the phrase "*that accused is charged of an offence involving **trafficking of cannabis,***". Whereas, the annexed charge sheet provide

that the applicant was found in unlawfully possession of Narcotic Drugs to wit 181 Kg of cannabis sativa known as Bhangi. In fact, plainly it seems what is contained in section 29(1)(b) of the Act is quite different from what the particulars of the offence provides. I think, I should clear this doubt by saying the word trafficking in law especially under the Drugs Control and Enforcement Act (supra) has been interpreted to mean even possession of narcotic drugs or psychotropic substance. See, section 2 of the Drugs Control and Enforcement Act (supra) to that effect. Therefore, application of section 29(1)(b) of the Drugs Control and Enforcement Act (supra) where the applicant was arrested on unlawful possession of the narcotic drugs of cannabis sativa or bhangi is proper as to the case at hand.

Being guided by section 29(1)(b) of DCEA and particulars of the offence of the appended charge sheet in the applicant's affidavit, it is clear that the applicant is not entitled to be admitted to bail because the offence is facing her in the trial court is unbailable. It has become unbailable due to the fact that the weight of cannabis sativa being found unlawfully in her possession is more than twenty kilograms (i.e., 181kgs of cannabis sativa).

Before, I close this chapter it is imperative to make observation as to what the learned State Attorney had submitted before he closed the

submission. Indeed, the applicant has brought this application vide the provisions of the Constitution of the United Republic of Tanzania and the Criminal Procedure Act [Cap 20 R.E. 2019]. I think Mr. Kigoryo was right that the applicant's Chamber Summons ought to have included the provisions of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] on bail application. I find his submission is plausible since the offence facing the applicant is one among of the economic crimes in our jurisdiction. It is very true that by including the provision of Economic and Organised Crime Control Act definitely would also empower this court to grant or deny her bail.

In the upshot, I find the application is incompetent before this court. Hence, I strike it out and the applicant shall remain in remand custody pending determination of Economic Case No.4 of 2022 before the District Court of Masasi at Masasi.

It is so ordered.



E.I. LALTAIKA

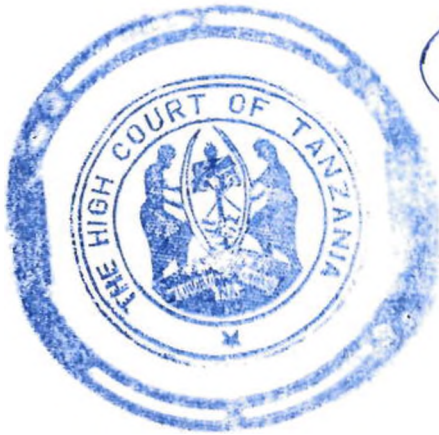
A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over the printed name and title.

JUDGE

3.8.2022

Court:

This ruling is delivered under my hand and the seal of this Court on this 3rd day of August, 2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney and the applicant who has appeared in person, unrepresented.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over a horizontal line.

JUDGE

1.8.2022