

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CRIMINAL APPLICATION NO. 29 OF 2022

(Originating from District Court of Newala at Newala in Economic Case No.2 of 2022)

BETWEEN

HAMZA FIKIRI MSHAMU@ KUMBUKA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

28/9/2022 & 5/10/2022

LALTAIKA, J.

The applicant **HAMZA FIKIRI MSHAMU@ KUMBUKA**, is charged before the District Court of Newala in Economic Case No.2 of 2022. It is alleged that the applicant was found in trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement [Cap. 95 R.E. 2019].

The applicant has moved this court to admit him to bail pending determination of the main case. His application is predicated on Article 13(6)(b) and 108(2) of the Constitution of the United Republic of Tanzania (as amended from time to time), section 36 of the Economic and

Organised Crime Control Act [Cap. 200 R.E. 2019] and section 148(1) and (3) 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. **WILBROAD NDUNGURU**, learned Senior State Attorney.

When this matter came on for hearing on 28/9/2022 the applicant appeared in person, unrepresented. Whereas, the respondent was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney. At the outset of the hearing the applicant gave his opinion and proposed the respondent to start the submission first.

At the very beginning Mr. Ndunguru submitted that the application is misplaced. The learned Senior State Attorney submitted that the applicant cannot be admitted to bail by any court in the United Republic of Tanzania. The learned Senior State Attorney stressed that the applicant is charged with trafficking narcotic drugs known as bhangi weighed 46 kilograms. The learned Senior State Attorney further contended that according to section 46(1)(b) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] bail is not available where the narcotic drugs exceed 20 kilograms. Mr. Ndunguru insisted that even if the applicant brings trustworthy sureties the court is hand tied. He went further and argued

that the word trafficking as used in this Act includes possession. In cementing his argument, the learned Senior State Attorney referred this court to cases of this court, the case of **Mohamed Selemani Mohamed and Another vs Republic**, Misc. Crim. Application No.27 of 2022 (Muruke J) and **Rajabu Yusuf Mchingama and 4 Others vs Republic**, Misc. Criminal Application No. 22 of 2019(Ngwembe J) (all are unreported).

Furthermore, the learned Senior State Attorney submitted that the instant matter should be dismissed. Apart from that, the learned Senior State Attorney argued that the present case was not supposed to be the Economic Case because the weight of the drugs concerned do not exceed 50 kilograms.

More so, Mr. Ndunguru stressed that be it as it may, the offence facing the applicant is still unbailable because the weight of the drugs is above 20 kilograms. To this end, the applicant submitted that the applicant should not use the opportunity for change of charge sheet from Economic offence to normal offence to apply for bail, since the change will be done immediately.

In a very brief rejoinder, the applicant prayed that since this court cannot grant him bail, he should be taken back to the lower court to proceed with his case.

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 15 of the of the Constitution of the United Republic of Tanzania.

However, I should state that not all offences are bailable 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 a bailable or unbailable 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 is facing in court.

As I intimated earlier that applicant is facing an offence of trafficking in narcotic drugs before the District Court of Newala. 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 bhanghi being trafficked.

In the present case, the particulars of the offence provides that the applicant was arrested while found trafficking in narcotic drugs to wit 46.06 kilograms of cannabis sativa or bhanghi. Based on the given particulars from the charge annexed in the affirmed affidavit of the applicant the amount of 46.06 kilograms of cannabis sativa or bhanghi being trafficked 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 of cannabis, khat and any other prohibited plant weighing twenty kilograms or more cannot be admitted to bail. The applicant's affidavit has appended a copy of the charge sheet which reads:

-

" HAMZA S/O FIKIRI MSHAMU @ KUMBUKA charged on 17th day of February 2022 at days hours at Luchingu Street within Newala town Council in Mtwara Region was found trafficking narcotic drugs to wit forty six point zero six kilograms of cannabis sativa."

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 trafficked is more than twenty kilograms (i.e., 46.06kgs of cannabis sativa).

Before, I close this chapter it is imperative to make observation as to what the learned Senior State Attorney had submitted before he closed the submission. The law which has created the economic cases is the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019].

Furthermore section 57(1) of the EOCCA provides for offences prescribed in the First Schedule to this Act shall be known as economic offences and triable by the Court in accordance of the provision of this Act. It has also prompted me to go at the First Schedule of the EOCCA which has listed the offences related to drugs control to form part of the economic offences. In fact, this is reflected at paragraph 23 of the First Schedule which has listed the offences under section 15,16 or 23 of the Drugs Control and Enforcement Act to be economic offence. In the present case the applicant is charged with the offence of trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement [Cap. 95 R.E. 2019]. Based on the charging section, I am of the settled position that the applicant was rightly charged with the Economic Case. In addition, I anticipated the learned Senior State Attorney to lead this court to the proper provisions of the law which provides for criteria used to determine which amount of trafficked narcotic drugs falls within the normal criminal case and also which amount of the trafficked narcotic drugs deserve to be an economic case. Absence of that, I hold that the learned Senior State Attorney's argument is misplaced hence, it is dismissed.

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.2 of 2022 before the District Court of Newala at Newala.

It is so ordered.



E.I. LALTAIKA

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

JUDGE

5.10.2022

Court:

This ruling is delivered under my hand and the seal of this Court on this 5th day of October 2022 in the presence of Ms. Florence Mbamba learned 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 the printed name.

JUDGE

5.10.2022