

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CRIMINAL APPLICATION NO. 26 OF 2022

(Arising from Criminal Sessions Case No. 74 of 2022 in the High Court Bukoba Registry at Bukoba)

IDD MABRUKU----- APPLICANT

VERSUS

REPUBLIC -----RESPONDENT

RULING

Date of last Order: 21.09.2022

Date of Judgment: 21.10.2022

A.E. Mwipopo, J.

Idd Mabruk is facing before this Court charges for the offence of unlawful possession of narcotic drugs contrary to section 16 (10) (a) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002. It was alleged that on 27.02.2015 at Uswahilini area within Bukoba Municipality in Kagera Region the applicant was found in possession of 141 sachets of narcotic drugs known as heroin. After investigation was complete, the prosecution instituted Criminal Sessions case No. 74 of 2022 in this Court. The applicant who has been in custody since February, 2015, filed the present application for bail pending trial. The

application was filed by Chamber Summons supported by applicant's affidavit. The respondent opposed the application through the affidavit sworn by Mr. Emmanuel Luvunga, Senior State Attorney.

Mr. Fahad, advocate for the applicant, submitted in support of the application that the applicant is facing charges for the offence of unlawful possession of narcotics drugs known as heroin contrary to section 16 (1) (a) of the Drugs and Prevention of Illicit Drugs, Cap. 95 R.E 2002, in this Court. The applicant is alleged to have been found in possession of 141 sachets of narcotic drug known as heroin. The report of the Chief Government Chemist shows that the applicant was found in possession of 8.4229 grams of heroin. The said amount of heroin found with the applicant was not for commercial purpose but for his own use. The said illicit drugs is worth less than ten million shillings and this was not contested by the respondent in their Counter Affidavit. This is seen in paragraph 5 of counter affidavit where the respondent deposed that there is nothing showing that the said narcotic drugs was worth ten million shillings.

It was his submitted that under section 27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act it was the duty of the commissioner for the National Co-Ordination of Drugs control to provide certificate when the value of the narcotic drugs exceed ten million shillings. As there is no proof that the heroin found in possession of the applicant is worth ten million shillings and the report of

Chief Government Chemist is silent on the value of the drugs, the court has to draw adverse inference that the said illicit drugs were not worth ten million shillings. The Court should also consider the weight of the said narcotic drugs in assessing its value.

He went on to say that the offence which the applicant was charged with is bailable under section 27 (1) (a) and (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act read together with section 148 (5) (a) (i) and (ii) of the Criminal Procedure Act, Cap. 20 R.E 2002. The applicant is supposed to be treated according to the laws available at the time he committed the offence as it was held by the High Court in the case of **Mussa Makota vs. Republic**, Misc. Criminal Application No. 214 of 2019, High Court at Dar Es Salaam, (unreported) at page 5. The applicant has never been convicted for any criminal offence or jumped bail. If he is granted bail, the applicant is ready to appear before this court whenever he is needed on the terms this court find it proper.

In his reply, Mr. Emmanuel Luinga, Senior State Attorney representing the respondent, opposed the application for bail. He said the application for bail has relied on the weight of the narcotic drugs to conclude that it was for applicant own use. The said reason has no merits. Section 27 (1) (a) of the Drugs and Prevention of illicit Drugs Act provides that the accused person of an offence involving trafficking in drugs, narcotics or psychotropic substances, but does 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. The circumstances of this case shows that the number of sachets prove that the narcotic drugs was for commercial purpose.

On the applicant's point that the information and Chief Government Chemist report does not show the value of the alleged narcotic drugs, the Senior State Attorney said that there is nothing in record to show the value of the narcotic drugs. There is no evidence to show the value of the respective narcotic drugs. The Chief Government Chemist duty is to give report if the drugs set for examination is narcotic drugs and the weight of the said drugs. Not to provide the value of the narcotic drugs. The court should consider circumstances of the case including the weight and number of sachets which shows that the applicant was selling illicit drugs.

He said further that the cited case of **Mussa Makota vs. Republic** (supra) is distinguishable as the value of the narcotic drugs was mentioned and was below ten million shillings. The offence the applicant was charged with is not billable as section 27 (1) (a) of the Drugs and Prevention of Illicit Traffic in Drugs Act denies bail for the offence where circumstances shows that the illicit drugs were for commercial purpose.

In rejoinder, the counsel for the applicant said that the said 141 sachets contained 8.4.grams of narcotic drugs known as heroin. Under common sense how many grams each sachets contain of the narcotic drugs? On the issue of certificate of Commissioner of National Co - ordination of Drugs Control, the presence of certificate showing the value of the narcotic drugs exceeds ten million shillings will be the sufficient reason to deny bail under section 27 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act. In absence of the certificate, the court could not say that the applicant has no right to bail. The law denies bail where there is certificate showing the value of the narcotic drugs is more than ten million shillings.

After considering submissions from both counsels, there is no dispute that the applicant is facing before this Court charges for the offence of unlawful possession of 141 sachets of narcotic drugs known as heroin contrary to section 16 (10) (a) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002. The applicant in his affidavit has shown that the weight of the heroin he was found in possession is 8.4229 according to report of Chief Government Chemist, the fact which was not denied by the respondent. Bail in the offence of unlawful possession of narcotics drugs contrary to section 16 (10) (a) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002 is provided under section 27(1) (a) of the same Act. The section reads as follows hereunder:-

"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;

(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.

(2) The conditions on granting bail specified in section 148 of the Criminal Procedure Act, shall apply mutatis mutandis to all bailable offences under this Act."

From the above cited provision, the law restrict the grant of bail to the person charged with illicit traffic in drugs against the Drug and Prevention of Illicit Drugs Act. But, where the charge is for possession of narcotic drugs not meant for conveyance or commercial use bail could be granted. For non-trafficking of narcotic drugs offences, bail is restricted only if it is certified by Commissioner that narcotic drugs are valued over ten million shillings. Thus, before granting bail to a person charged for an offence of being in possession of narcotic drugs as in this

case, the Court has to take into account two factors, first, if the circumstances in which the offence was committed shows it was not meant for conveyance or commercial use; and second, if the value of the drugs is certified to be over ten million shillings.

In the case of **DPP vs. Bashiri Waziri and Another**, Criminal Appeal No. 168 of 2012, Court of Appeal of Tanzania at Mwanza, (unreported), while interpreting section 148 (5) (a) (ii) of Criminal Procedure Act, Cap. 20 R.E. 2002 and section 27(1) (a) (b) of the Drugs and Prevention of Illicit Drugs Act, Cap. 95 R.E. 2002, the Court of Appeal held at page 21 that:-

"What this means is that for a charge of trafficking in drugs such as the present one, the doors to bail are automatically closed, but for a non-trafficking charge involving the drugs listed in the Schedule to the Act bail is restricted only if the value of the drugs is certified to be over ten million shillings."

In the present case, the applicant was charged for the offence of unlawful possession of 141 sachets of narcotic drugs known as heroin. The value of the said heroin was not provided in the particulars of the offence and the respondent did not dispute the assertion by the applicant in his affidavit that the Commissioner did not file certificate establishing the value of the drugs exceed ten million shillings. In absence of the certificate from the Commissioner, the Court finds that

there is no evidence to prove that the value of the narcotic drugs were exceeding ten million shillings.

The applicant relied on the weight of the narcotic drugs found in his unlawful possession to say that it was not for conveyance or commercial purpose. On the other hand, the counsel for the respondent relied on the number of sachets of the heroin found in the possession of the applicant to say that the said narcotic drugs was for commercial purpose. In the circumstances of this case, I get it very difficult to rely on one factor only between the weight of the heroin or the number of sachets which were found in the possession of the applicant in determining whether the said narcotic drugs was for commercial purpose or not. The reason is that the 141 sachets which was found in applicant's possession shows possibility the applicant was using the narcotic drugs for commercial purpose. However, the weight of the said narcotic drugs which is 8.4229 grams say something else. It shows that it was not possible for such weight to be divided in all those sachets hence the sachets may be used for other purpose. This means more evidence is needed to satisfy the Court that the narcotic drugs found in possession of the applicant were for commercial purpose. At this stage, there is no such evidence. In the circumstances of this case, the number of sachets could not be the only determinant if the narcotics drugs were for commercial purpose.

Therefore, I find that the offence which the applicant is facing in this Court is bailable and the application is allowed. The Bail is hereby granted to the applicant namely Idd Mabruki @ Ibrahim Mabruk upon fulfilling the following conditions:-

1. The applicant shall deposit in this Court a sum of ten million shillings in cash or in alternative he shall deposit a title deed of immovable property to equivalent amount certified by Government Valuer.
2. The applicant to have two reliable sureties who resides within the jurisdiction of this Court who shall sign a bond of three million shillings each. Documents introducing sureties must be verified before signing the bond.
3. The applicant to surrender his passport or any travelling documents in his name to the Registrar of the High Court of Tanzania, Bukoba District Registry.
4. The applicant shall appear in Court on all dates to be scheduled by this Court in Criminal Sessions Case No. 74 of 2022.
5. These bail conditions shall be verified by the Deputy Registrar of the High Court of Tanzania, Bukoba Registry.

It is so ordered accordingly.



A.E. Mwipopo

Judge

21/10/2022

Court: Ruling was delivered today in the presence of the applicant and the counsel for the respondent.



A.E. Mwipopo

Judge

21/10/2022