

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 270 OF 2021

(Arising out of Criminal Case No. 220 of 2021 from the District Court of Kinondoni at Kinondoni)

HAJI DAUDI MLOLWA 1ST APPLICANT

ISAKA MATAJA ESORE 2ND APPLICANT

MICHAEL CONSTANTINE IKUZA 3RD APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

24th January, 2022, & 31st January, 2022

ISMAIL, J.

This Court is called upon to consider a bail application, pending trial of the criminal charges that the applicants are facing. The said proceedings are pending in the District Court of Kinondoni at Kinondoni (Criminal case No. 220 of 2021). The allegation is that the trio was found in possession of Cannabis Sativa ("bhang"), described as one of the prohibited plants. It weighed 62.53 kilograms.



The application is supported by a joint affidavit sworn and affirmed by the applicants in which grounds for the prayer are stated. The averment by the applicants is that bail is a fundamental constitutional right that upholds the presumption of innocence of an accused person, until he is proven guilty. The applicants have further indicated their willingness to abide by the bail conditions as shall be set by the Court.

When the matter was called on for hearing, Mr. Eric Shija, learned State Attorney, represented the respondent while the applicants were unrepresented. Mr. Shija indicated that he did not wish to file a counter-affidavit. He, instead, chose to submit on the legal aspects of the application.

Submitting in support of the application, the 1st applicant argued that the offence with which they are charged is bailable. His contention is premised on the fact that the said offence does not feature in the list of unbailable offences enumerated in section 29 (1) of the Drugs Control and Enforcement Act, Cap. 95 R.E. 2019. He argued that section 29 (1) (d) expressly provides that suspects who are found in possession or trafficking large volumes of narcotics are charged under section 20 of Cap. 95. The 1st applicant sought to draw a distinction from the offence with which they (applicants) stand charged. The 1st applicant maintained that this is a bailable offence as it does not involve trafficking. He further asserted that

he has sureties who are reliable, adding that he has no history of jumping bail.

While supporting the 1st applicant's contention, the 2nd applicant took the view that it is only this Court which can admit them to bail. He submitted that he had reliable sureties and will abide to bail conditions.

For his part, the 3rd applicant joined hands with his colleagues in urging the Court to see that the provision under which they are charged do not prohibit granting of bail. He argued that it would be a different case if the they were charged under section 20 of Cap. 95 which restricts granting of bail.

Submitting in rebuttal, Mr. Shija began by expressing his opposition to the application. He argued that charges that the said applicants are facing were preferred under section 11 (1) (d) of Cap. 95. He argued that section 29 (1) (b) is to the effect that no bail can be granted if the subject matter of the charge weighs 20 kilograms or more. While acknowledging that the word used in the section 29 (1) (b) is **trafficking**, he took the view that the interpretation under section 2 of Cap. 95 covers possession as part of trafficking. Mr. Shija's view is that, since the weight of the drugs recovered from the applicants exceed 20 kilograms, then bail cannot be granted in this case. He prayed that the application be dismissed.

In their separate rejoinders, the applicants reiterated what they stated in their respective submissions in chief. They urged the Court to grant the application.

From the parties' brief submissions one singular question for determination is whether the application is meritorious and, therefore, grantable.

Let me begin the disposal by laying a general foundation on the subject of this application. This is to the effect that bail, as the applicants have rightly submitted, is a fundamental constitutional right accorded to an accused person. Such grant is anchored in the cherished presumption the accused, in whose favour bail is admitted, is presumed to be innocent throughout the trial process, until he is finally adjudged guilty or not guilty (See ***DPP V Bashiri Waziri & Another***, CAT-Criminal Appeal No. 168 of 2012 (unreported)). This means that the life span of a bail is the period in which the trial proceedings last in court. This is the stance adopted by the Supreme Court of India in ***Dataram Singh v. State of Uttar Pradesh & Another***, Criminal Appeal No. 227 of 2018. In the latter, it was held that, in deciding bail matters, the fundamental postulate of criminal jurisprudence is the ***"presumption of innocence meaning thereby that a person is believed to be innocent until found guilty."***

The contention between the parties in this matter revolves around the import brought by section 29 (1) of Cap. 95. The view expressed by the applicants is that the offence with which they are charged is not part of the offence in respect of which bail has been withheld. This sharply contrasts the respondent's view that section 29 (1) (b) of Cap. 95 lists trafficking of cannabis of the weight in excess of 20 kilograms as one of the unbailable offences. This compels me to reproduce the substance of the said provision. It reads 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."

The wording of this provision confirms what Mr. Shija contends with respect to weight of the substance beyond which no bail can be granted. In the instant case, the weight of the impounded substance is 62.53 kilograms. This weight is far in excess of the 20-kilogram cap set by the law, meaning that its weight is threefold the maximum weight that allows a police officer or a court to grant bail.

The applicants have also contended that the charge they are staring at relates to possession and not trafficking stated in the section 29 (1) (b) of Cap. 95, that the respondent has relied on. With due respect to the applicants, this contention is flawed. My view is predicated on what obtains in section 2 of Cap. 95 that Mr. Shija cited. This is a definition section that has factored in possession as part of trafficking. For ease of reference, the said provision states as follows:

*""trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, **possession**, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer but shall not include*"[Emphasis added]

It follows, therefore, that possession of narcotics is, in the context of the cited provision, part of trafficking stated in section 29 (1) (b). This is the same, exact offence that the applicants are facing in the trial court. It is an offence in respect of which bail is allowed, only if the weight is below the 20-kilogram mark set by law. My position is fortified by the reasoning of this Court when it sat to consider a bail application in which the same provision of the law was under consideration. This was in the case of **Emmanuel**



George Munisi & Another v. Republic, HC-Miscellaneous Criminal Application No. 91 of 2018 (MZA-unreported), in which the Court made the following remarks:

"While powers of the Court to preside over matters pertaining to bail applications may be both inherent and statutory, the process and determination of whether bail should be granted or not, are dictated upon by statute. This is an instrument under which a charge is preferred. It is the basis on which the Court can make a finding as to whether this is a fit case for admitting the accused person to bail. Such legislation will provide clearly if the offence with which the bail applicant is charged is bailable or otherwise. If the offence is bailable, the Court will go ahead and determine if, on the basis of the affidavit and arguments in support, conditions for such grant have been met. If the offence is non-bailable the Court's potency becomes totally nullified."

Convinced that circumstances of the cited case militated against the granting of bail, the Court dismissed application on the ground that the offence was unbailable. This is the predicament that the applicants find themselves in. Their quest for bail pending trial is scuppered by the exclusion of the Court's jurisdiction imposed by the law. The offence is simply unbailable. In sum, this application fails and it is hereby dismissed.

Order accordingly.

DATED at **DAR ES SALAAM** this 31st day of January, 2022.



M.K. ISMAIL

JUDGE

