

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 51 OF 2022**

**HAJI DAUDI MLOWA ..... 1<sup>ST</sup> APPLICANT**

**ISAKA MATAJA ESORE ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Arising from the District Court of Kinondoni at Kinondoni  
in Economic Case No. 220 of 2021)**

**RULING**

27<sup>th</sup> and 30<sup>th</sup> May, 2022

**KISANYA, J.:**

The above named applicants together with one, Michael Constantine Ikuza (who is not a party to this application) were arraigned before the District Court of Kinondoni at Kinondoni for the offence of unlawful possession of prohibited plants of narcotic drugs contrary to section 11(1)(d) of the Drug Control and Enforcement Act [Cap. 95, R.E. 2019]. It is alleged by the prosecution that, on 11<sup>th</sup> day of June, 2019, at Wazohill area within Kinondoni District Council in Dar es Salaam, the applicants were found in possession of prohibited plants namely cannabis sativa commonly known as "Bhangi" weighing 62.53 kilograms.

During the pendency of the case before the District Court of Kinondoni, the applicants have moved this Court to admit them to bail pending trial. The

application is made under section 148(1) of the Criminal Procedure Act, Cap. 20, R.E. 2019. It is supported by the joint affidavit of the applicants.

The respondent filed a counter-affidavit to contest the application. It was deposed, among others, that the offence preferred against the applicants is unbailable.

When the matter came for hearing, the applicants appeared in person, whilst Ms. Nura Manju, learned State Attorney appeared for the respondent.

Before the hearing of appeal could proceed in earnest, I probed the parties to address me on whether this Court has jurisdiction to determine the application for bail pending trial in respect of the offence levelled against the applicants.

Responding to the issue raised by the Court, the applicants submitted that their prayer for bail pending trial was refused by the District Court of Kinondoni on the account that it is not bailable under section 29(1)(b) of the DCEA. They further contended that when the case was re-assigned to another magistrate, they were informed that the offence is bailable and thus, advised to come to this Court because the trial court had already made a decision in relation to the prayer for bail. As a result, both applicants urged me consider the application on merit. They were of the view that the Court has mandate to determine the application.

On the other side, Ms. Manju submitted that the application is incompetent

before the Court. Referring to section 161 of the CPA, the learned State Attorney argued that the applicants ought to have filed an appeal against the decision of the subordinate court which refused to admit them to bail pending trial.

I have dutifully considered the submissions from the applicants and learned State Attorney. It is worth noting here that the applicants are charged with the offence under the DCEA. In that regard, the applicable provisions on bail pending trial is section 29 of the DCEA. The provisions of section 148 of the CPA cited in the chamber summons apply at the time of imposing the bail conditions. For better understanding of the discussion at hand, I find it apt to reproduce section 29 of the DCEA. It provides that:-

*"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) that accused is charged of an offence involving trafficking of Amphetamine Type Stimulant (ATS), heroin, cocaine, mandrax, morphine, ecstasy, cannabis resin, prepared opium and any other manufactured drug weighing twenty grammes or more;*

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

*(c) that accused person is charged of an offence relating to precursor chemical, other substances proved to have*

*drug related effect or substances used in the process of manufacturing drugs, thirty litres in liquid form and thirty kilograms in solid form or more; and*

*(d) a person is charged under the provision of sections 16, 20 or 23.*

*(2) N/A*

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

It is clear that the above cited provisions list offences under the DCEA which are not bailable. As indicated earlier, the applicants are charged with the offence of unlawful possession of prohibited plants of narcotic drugs preferred. Since the said offence is not listed in section 29(1) of the DCEA, I am of the considered view that it is a bailable.

Next for consideration is when an application for bail in respect of the offence preferred against the applicants is filed in this Court. Reading from the opening clause of section 29(1) of the DCEA, I am of the considered view the mandate to determine bail application is vested in “a court before which an accused is brought or appear”.

It is common ground that the applicants have not been brought or charged before this Court. Their case is pending before the District Court of Kinondoni. Further to this, section 3 of the DCEA is to the effect that, offence of unlawful

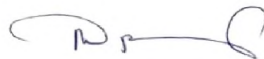
possession of prohibited plants of narcotic drugs subject to this application is tried in the subordinate courts. That being the case, I am of the considered opinion that the applicant ought to have applied for bail before the District Court of Kinondoni. The supporting affidavit is silent on whether the said prayer was pressed before the subordinate court. Even if such application was made and refused as contended by the applicants, the proper recourse was to appeal against the said decision or order. This is pursuant to section 161 of the CPA which provides:-

*"161 All orders issued under section 148-160 by any magistrate shall be appealable to and may be reviewed by, the High Court".*

From the foregoing, I agree with the learned State Attorney that the application is not properly before this Court. The applicants were required to move the subordinate court to admit them to bail pending trial or appeal against the decision of subordinate court refusing or failing to grant the application.

Consequently, this application is hereby struck out for the reasons stated afore.

DATED at DAR ES SALAAM this 30<sup>th</sup> day of May, 2022.



S.E. Kisanya  
JUDGE

Court: Ruling delivered this 30<sup>th</sup> day of May, 2022 in the presence of the applicants and Messrs Ramadhan Kalinga, Ally Mbogoro and Timoth Mmari, learned State Attorneys for the respondent.



A handwritten signature in black ink, appearing to be "S.E. Kisanya".

S.E. Kisanya  
JUDGE  
30/05/2022