

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM REGISTRY

MISC. ECONOMIC CAUSE NO. 01 OF 2018

(Originating from Economic Crime Case No. 79/2017 of Kisutu RM's Court)

- 1. MINDA MUSSA MFAMAU..... 1st APPLICANT**
2. FATUMA KASSIMU MPONDI 2nd APPLICANT
3. OSWINI LEONARD MANGO..... ..3RD APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

2/3 & 9/3/2018

F.N. Matogolo, J.

This is an application by three applicants, namely Minda Musa Mfamau, Fatuma Kassimu Mpondi and Oswini Leonard Mango.

The application was filed by Mr. Amini M. Mshana advocate on their behalf. The same is by chamber summons made under Sections 36(1) of the Economic and Organized Crimes Control Act, Cap.20(sic) RE.2016 and Section 29(3) of the Drug Control and Enforcement Act, 2015. The chamber summons is supported by an affidavit of Amin M. Mshana.

The respondent was served with the chamber summons and the accompanying affidavit but opted not to file counter affidavit.

On 9/2/2018 when this application came for mention, it was agreed by the parties and this Court ordered hearing of this application be by written submissions. The schedule to file the submissions was fixed accordingly. The applicant's advocate was ordered to file written submission on or by 16/2/2018 to which was duly complied with. The respondent was ordered to file his written submission on or by 23/2/2018 which he complied with. Rejoinder by the applicants if any was to be filed on or by 2/3/2018. But on 2/3/2018 when the case was set for mention with a view to fix date for ruling, Mr. Reuben Simwanza advocate holding briefs for Mr. Amini Mshana Advocate for the applicants applied for extension of time to enable them file a rejoinder on the ground that they were served with the reply submission on 27/2/2018 instead of 23/2/2018. The prayer was granted and the Court ordered rejoinder to be filed on 05/3/2018, which they did.

In his written submission, the applicant's advocate first prayed for the affidavit to be adopted as part of his submission. He stated that his arguments are based on paragraph 5 of the affidavit in which the applicants denied that the purported contraband is heroin and that does not weigh 375.20 grams thus the charged offence is bailable. He learned advocate further submitted that the application is not opposed as the respondent did not file counter-affidavit unless she submit on legal issues. To back up his argument he cited the cases of **Asha Said vs. Given Manyanga & Morgan Manyanga, Misc.** Civil Application No. 28/2003 H/Court and **Rafael Onwuka Vs. Lukuman Owolewa, CA/ 1099, Court**

of Appeal, (Ilorin Division) a Nigerian case, although in both cases he did not supply copies.

He said, the charged offence is not bailable because of the amount of the alleged trafficked heroin weighing 375.20 grams, which he said may be overstated by the prosecutor for purpose of victimizing the applicants in order to deny them bail. For that he said there must be control mechanism by a lawful and an independent organ. That, the prosecution in the charge sheet conclusively stated that the type of narcotic drug is Heroin whose weight is 375.20 grams which the applicants vehemently deny.

Mr. Amini Mshana submitted further that it was important for the Chief Government Chemist to certify first the type of narcotic drug involved and its weight before the applicants were charged, which would combat arbitrariness on part of the prosecution. On the issue of overstatement and the need for control mechanism, Mr. Mshana cited the case of **Prof. Dr. Costa Riki Mahalu & Another Vs. The Hon. Attorney General**, Misc. Cr. Cause No.35/2007.

He said as both parties are equal and should be treated equally as per our constitution while the prosecution is alleging the substance has weight of 375.20 grams, the applicants are denying. There is therefore uncertainty the fact which was not challenged. That under such circumstances of the uncertainty the same should be determined by the Government analyst. That as the affidavit raised the question of type and weight of the drug, they expected the respondent to come with the Government analysis report annexed to the counter-affidavit. But did not do so, the existing doubt is to the applicants advantage.

Mr. Mshana learned advocate concluded by submitting that the applicants are wrongly curtailed of their freedom by refusal of bail where conditions such refusal have not been fulfilled. But they are ready and willing to meet bail conditions that may be set by the Court and prayed for the application to be granted.

On her part M/s Mukabatunzi Dereck learned Senior State Attorney in her written submission she stated that on 9th February 2018 when the case came for mention, the respondent informed the Court that they are not intending to file Counter-affidavit but they resist the application. The reason they gave why they would not file counter-affidavit is that the matters which were stated in the applicant's affidavit are matters of law which cannot be countered in an affidavit. That is why they prayed for the Court to proceed with hearing. The applicants have no objection to their prayer but only requested hearing by written submissions. The request which was granted. The learned Senior State Attorney submitted further that the applicants are charged with Economic offence of Drug Trafficking C/S 15(1) (b) read together with paragraph 23 of the first schedule to the Economic and Organized Crimes Control Act, Cap.200 R.E.2002 as amended by Act No.3/2016. That according to Section 29(1)(a) of the Drug Control and Enforcement Act No.5/2015 as amended by Section 13 of the Drug control and Enforcement Act of 2017, the weight for which bail is granted is 20 grams. The applicants are charged for Trafficking 375.20 grams of heroin. The offence is not bailable, therefore the bail application has no legal basis. She said in order for issue of bail to be argued, the charged offence must be bailable which is not the case in this application,

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that mere denial of the charge does not make the matter inconsistency. Whether the trafficked drug is heroin and whether weight indicated in the charge is that one is a matter of evidence which cannot be argued at this stage, hence it was brought prematurely. The learned Senior State Attorney argued that by citing Section 29(2) of the Act and applicants denial as to the weight amounts to inconsistency is purely misinterpretation of the law.

She said from the wording of this section, it goes without saying that issue as to weight/type of drugs are the matter of evidence so they are brought prematurely. The learned Senior State Attorney prayed to this Court to dismiss the application as it lack merits.

In rejoinder, the applicants learned advocate basically reiterated his submission in chief with minor clarification in which he disagreed with what the learned Senior State Attorney has submitted.

Having gone through the contents of the relevant documents filed by the applicants' advocate, and having read the written submissions by the respective counsel this court is called up on the decide whether or not, given the charged offence can grant the application. The respondent position is that this Court cannot grant bail to the applicants because the charged offence is non-bailable due to the type and weight of narcotic drug the applicants were found trafficking.

That is heroin weighing 375.20 grams. On his part Mr. Amin Mshana contends, that were allegations in the charge sheet by the respondent that the applicants were found trafficking in heroin weighing 375.20 grams does not make the offence non-bailable. The argument is premised on the fact

that the parties are equal before the Court and should be treated equally as per our constitution. Allegations by one party cannot deny the other party his right to bail. The learned advocate alleged issue of overstatement of the weight by the respondent for purpose of denying bail to the applicants and requested for a control mechanism which can be done by a lawful and independent organ such as the Government analyst who is supposed to certify the type and weight of narcotic drug before a charge is drafted. It was correctly submitted by the learned Senior State Attorney that require evidence which cannot be brought at this stage of bail application. Although Mr. Mshana learned advocate complained that doing that it amounts to the Court condoning arbitrariness of the respondent, but that is how the law it is.

We cannot venture at the moment to call evidence for purpose of establishing whether what is alleged to have been trafficked by the applicants is heroin weighing 375.20 grams.

I entirely agree with Mr. Mshana that the weight of narcotic drug involved is also a determinant factor in sentencing and that is done after the type and amount of narcotic drug concerned is already established. But in no way we can demand a party to bring evidence to establish type of narcotic drug and its weight or amount, as doing so amounts to proof of the offence against the applicants before their trial commences.

That is why the learned Senior State Attorney in her reply submission argued that the argument by the learned advocate was brought prematurely.

The next question is whether the charged offence is bailable. Section

29(1)(a) of the Drug Control and Enforcement Act, No.5/2015 as amended by Act No.15/2017 reads:-

"29(1) A police officer incharge 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 person is charged of an offence involving trafficking of Amphetamine type stimulant (ATS) heroin, cocaine, mandras, morphine, ecstasy, cannabis resin, prepared opium and any other manufactured drug weighing twenty grams or more.

(b)

(c)"

From the above cited provision, if accused is found trafficking in narcotic drug listed in paragraph (a) above, weighing twenty grams or more cannot be granted bail. The applicants are alleged were found trafficking in heroin weighing 375.20 grams. That amount is over and above the minimum amount or weight which this court is prohibited to grant bail. But even if there would be mistake in weighing the substances, I believe the difference would be minor and not as in the case at hand. There is an argument by the applicants' learned advocate that the prosecution in drafting the charge has overstated the amount. I think this require evidential proof if there was such overstatement or not. But which cannot be led at this stage. Otherwise the argument suggests the learned

advocate is attacking the provision itself, that is Section 29(1). But that cannot be done in the proceedings like one at hand he should have pursued it in the proper forum.

I am saying so because the learned advocate emphasized his point by even citing the decision in the case of **Prof Dr.Costa Riki Mahalu & Another Vs. The Hon. Attorney General**, (supra).


There is another issue for the respondent to be prohibited to submit on the facts for her failure to file counter-affidavit. Basically the respondent's submission is based on the law, that Section 29(1)(a) of the Drug Control and Enforcement Act, No.5/2015 as amended by Section 13 of the amendment Act No.15/2017 prohibits bail. This is a legal argument which could not be raised in counter-affidavit as thus would violate principles governing affidavits not to contain legal arguments.

The learned advocate also submitted on the importance of complying to the requirements of regulations in the Drug Control and Enforcement Regulations GN No.173/2016.

I must confess that I did not manage to get the said Government Notice. But even though I do not think if they can be against what is provided in the parent Act that is Act No.5/2015 as amended. Much I know it must be providing for the smooth application of the Act itself. The Act under Section 29(1)(a) denies bail to accused persons charged with trafficking in heroin of weight of 20 grams or above, the regulations cannot provide otherwise.

In upshort I do not see merits in this application the same is hereby dismissed the reason is obvious that the charged offence is non-bailable offence.

Order accordingly.


F.N. Matogolo
Judge
09/03/2018

Date: 09/03/2018

Coram: Hon. F.N. Matogolo, Judge

For Applicant: Mr. Amin Mshana - Advocate

1st Applicant: }
2nd Applicant: } **Present**
3rd Applicant: }

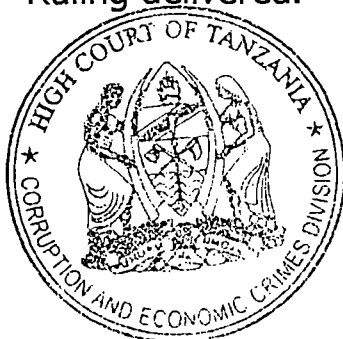
Respondent: Emma Msoffe - SSA

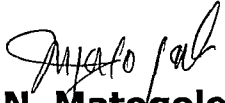
C/Clerk: Lukindo

M/s Emma Msoffe – SSA

My Lord I appear for the respondent. The applicants are present and represented by Mr. Amin Mshana Advocate. The matter is for ruling

Court: Ruling delivered.




F.N. Matogolo
Judge
09/03/2018