IN THE HIGH COURT OF TANZANIA

(THE CORRUPTION AND ECONOMIC CRIMES DIVISION)

AT MWANZA SUB-REGISTRY

MISCELLANEOUS ECONOMIC CAUSE NO.5 OF 2018

(Arising out of Economic Crimes Case No. 02/2018 from the Resident Magistrate's of Mwanza at Mwanza)

1. EMMANUEL GEORGE MUNISI
2. SAMWEL JOHN PETRO } **..... APPLICANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

RULING

26/02 & 28/2/2018
MATOGOLO, J.

Emmanuel George Munisi and Samwel John Petro(Applicants) have filed this application for bail through their advocate Mr. Kelvin N. Njau. The application is by chamber summons made under sections 29(4)(d) and 36(1) of the Economic and Organized Crime Control Act, [Cap. 200 R.E.2002]. It is accompanied by an affidavit taken by Lenin M. Njau.

The said chamber summons and the accompanying affidavit was served to the respondent, who filed counter affidavit taken by Setty Henry Mkemwa Principal State Attorney.

The background of the matter is that the applicants were charged in the Court of Resident Magistrate Mwanza with an offence of illegal dealing *in precursor* chemicals contrary to section 15 (1) (b) of The Drug Control and Enforcement Act, No. 5/2015 as amended by Act No. 3/2016 and Act No. 15/2017.It is alleged that they illegally delt with precursor chemicals, known as Ethyl Alcohol 414 litres on 20th December,2017at Kiseke 'A' within Ilemela District Mwanza Region.

At the hearing Mr. Anthony Nasimire and Mr. Kelvin Njau learned advocates represented the applicants, while Mr. Setty Henry Mkemwa learned Principal State Attorney and Mr. Shadrack Kimaro leaned Senior State Attorney appeared for the respondent/ Republic.

Arguing on the merits of the application, Mr. Nasimire learned advocate prayed for an affidavit taken by Kelvin Njau be adopted and form integral part of their submission. He stated, the applicants were brought in court for the first time in January, 2018 and it is not known when their

case will be committed to the High Court for trial. But when the applicants appeared before the Court of Resident Magistrate were not required to enter plea. They were told, that court had no jurisdiction to grant them bail that is why they have come to this court with their bail application. Mr. Nasimire said , the problem they see is with S. 29 (1) of Act No. 5/2015 if is not properly interpreted then the applicants may be denied bail. But it was his submission that the applicants are entitled to bail because:-

(i) There is no any word in S. 29 (1) which denies this court with powers to grant bail to the applicants for offences of this nature.

(ii) Given the nature of the charge against the applicants, the requirements of S.29 (1) of Act No. 5/2015 were not considered by the prosecution. He said they expected among others the prosecution to drawn a charge indicating offences under S.29 (1) (b) and (c) But in this case the offencesindicated in S.29(1) (c) are those preferred against the applicants. Mr. Nasimire therefore argued that the charge sheet cannot be used to deny bail to the applicants because of

the cumulative nature of the requirements of S. 29 (1) of Act No. 5/2015 as amended by Act No. 15/2017.

Mr. Nasimire learned advocate went on to submit that bail is not a privilege, but a constitutional right to the accused. The constitution being a parent law, any Act going against it cannot be allowed. He said he did not see any paragraph in the counter affidavit suggesting that if the applicants will be granted bail, they will interfere investigation or jump bail, or do any act which will cause the case not to be heard up to the end. On those grounds he prayed the applicants be granted bail.

On his part Mr. Lenin Njau learned advocate submitted that after the parliament has passed laws, the duty to interpret them is vested on courts. He posed a question whether the present applicants have right to bail . He answered that question in the negative because the charged offence curtails their freedom. But the provision used to charge them should not be interpreted to deny them bail as that would amount to convicting them without being heard. It is this court which willgive proper interpretation on

the relevant law and admit the applicants to bail. He said they expected to see good arguments in the counter affidavit to deny them bail.

But the only reason is that the law under which the applicants are charged denies them bail. He said their prayer is that this court should give proper interpretation of the statute as the applicants continuing to be in remand denying them bail amounts to judicial incarceration.

In his reply submission Mr. Shadrack Kimaro, learned Senior State Attorney apart from his initial prayer for an affidavit of Setty Mkemwa to be adopted and form part of their submission, he disputed what the learned advocates for the applicants have submitted before the court. But he also reminded the learned advocate that S. 29 (1) which they have been referring is not the one added paragraph (c). But it is Act No. 15/2017 through S.8 amended that section by deleting paragraph (a) and re numbering the remaining paragraphs as paragraph (a) and (b), Mr. Kimaro posed a question whether the charged offence is bailable. He said according to the charge sheet , the applicants are charged with illegal dealing with precursor chemicals contrary to section 15 (1) of Act No. 5/2015.

That the charge sheet has described the volume of the precursor chemicals which the applicants were found possessing as 414 litres.

But S.29 talks about volume which if a person is found dealing with the court cannot grant bail . He said the thresh hold is 30 litres. But the applicants we found possessing litres over and above. Mr. Kimaro disagreed with the argument by the learned advocates for the applicants that there is no word in S.29(1) which deny bail. He said the provision is very express and clearly states that the police officer incharge of police station or an officer of the authority or court shall not admit the accused to bail . He said the word use is mandatory. On the argument by Mr. Nasimire advocate that S. 29(1) is unconstitutional he said if so this is not a proper forum, they should go to a proper forum. On the applicants right to bail, Mr. Kimaro replied that, they have no problem with that but every law has exception but the offence the applicants are facing is non bailable. He also said there is no any other way to interpret the provision as suggested by Mr. Njau learned advocate.

Mr. Kimaro learned Senior State Attorney concluded by saying the argument raised by the applicants advocates were brought out of place and prayed to this court to dismiss the application.

In rejoinder Mr. Nasimire learned advocate submitted, the applicants are charged with illegal dealing in precursor chemicals, S. 2 of the Act No. 5/2015 define precursor as chemicals used in the process of manufacturing narcotic drugs or psychotropic substances. The 1st schedule to Act No. 5/2015 explains what is narcotic drugs and what is psychotropic substances. But we were not provided with the list of those narcotic drugs or psychotropic substances. He said it is difficult to understand why the applicants are held. Under such circumstances, that is why they are saying S.29 (1) of Act No. 5/2015 does not prohibit this court to grant bail to the applicants. He said perhaps the legislature should be adviced to tell what is precursor chemicals, otherwise he prayed to the court to admit the applicants to bail. Adding thereto, Mr. Njau said according to the principle of statutory interpretation, where thereare ambiguities to the interpretation of the law , the same should be interpreted in favour of the accused . As precursor chemicals is not properly defined, the same should be defined in favour of the applicants short of that people will be tortured for something not prohibited that is why they pray for proper interpretation and not to rely on the fact that the offence is not bailable, he concluded.

Once again like in the previous application, Miscellaneous Economic Cause No. 2/2018) the center of controversy is S.29 (1) of the Drug Control and Enforcement Act, (the Act). But in this application, the learned advocates for the applicants went ahead by requiring interpretation of the word"precursor chemicals"

Mr. Nasimire, while giving reasons why the charged offence is bailable, one reason is that they expected the prosecution to draw a charge indicating offence under S. 29 (1) (b) and (c). But the offences indicated in S.29 (1) (c) are those preferred against their clients. He said despite the cumulative nature of S.29 (1) that cannot deny bail to the applicants.

The provision under attack states as follows:-

> *"29 (1) A police officer incharge of a police station oran officer of the authority or a court before which an accused is brought or appear shall not admit the accused person to bail if:-*
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> *a. That accused person is charged of an offence involving trafficking ofAmphetamine type stimulant (ATS), heroin, cocaine*

mandrasmorphine, ecstasy, cannabis resin, prepared opium and any other manufactured drug weighing twenty grams or more.

b. *That accused is charged of an offence involving trafficking of ca nabis, khat and any other prohibited plant weighing twenty kilogram or more, and*

c. *That accused person is charged of an offence relating to precusor 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".*

From the above quoted provision a person who is found possessing precursor chemicals or other substance stated in paragraph (c), 30 litres or more in liquid form or 30 kilograms or more in solid form cannot be granted bail.

The applicants are charged under S. 15 (1) (b) of the Act as amended by Act no 15/2017, the same reads.

"15 (1) any person who (b) trafficksin

drugs or psychotropic substance commits

an offence and upon conviction shall be liable

to life imprisonment".

I don't see any problem with the two provisions. S. 15 is a charging section, and section 29(1) relates to bail, how is it cumulative in a way not desired by the learned counsel.

The other argument by the applicants advocate is on the definition of the words precursor chemicals.

The word is defined under S.2 of the Act:-

"means a chemical used in the process of manufacturing of narcotic drugs or psychotropic substances".

Perhaps another question that was not posed by the learned counsel is whether Ethyl Alcohol, the type of precursor chemical applicants were found dealing with is narcotic drug or psychotropic substances. I think going to that extent at this stage of bail is not proper, as this import the issue of evidence which is only given during trial. But for the moment it suffies to say that the applicants were found possessing or dealing with precursor chemicals. The next question begging is whether given the circumstances, are the applicants entitled to bail. It is at this juncture S. 29(1) of Act No 5/2015 as amended comes in. The provision prohibits bail to accused who is found possessing precursor chemicals of volume of 30

litres or more in liquid form or 30 kilograms or more in solid form. AS to whether this Court has powers to grant bail to the applicants, the provision, S.29(1) is very clear. By virtue of the enactment of Act No 3/2016 which established Corruption and Economic Crimes Division of the High Court under S. 3, the Act amended some of the provisions in Cap. 200 and confers trial jurisdiction to this Court for some offences found in Act No. 5/2015 as amended by Act No. 15/2017. These include offences found under S. 15, under which the applicants are charged, also Sections 16 and 23. The Court referred to under S. 29(1) is this Court, the same is stripped off with powers to grant bail to the applicants where the amount involve is 30 litres or more in liquid form, or 30 kilograms or more in solid form. There is therefore no other way the said provision can be interpreted. Mr. Njau was of the view that there is ambiquity, the law should be interpreted in favour of the applicants. With due respect I do not see any ambiquity in S. 29(1) which causes problem in interpretation.

This argument fails as well. Mr. Nasimire learned advocate asked this Court to remind the legislature to say as to what is precursor chemical. This is usually done by courts if it happens that a certain law or provisions appear to be against the Constitution and declare it unconstitutional. But for the

case at hand it is difficult to say what this Court can do and at what forum than to interpret as it is and give effect. Otherwise I do not see any merit in this application, the same is hereby dismissed.

Order accordingly.

F. N. MATOGOLO,
JUDGE
28/2/2018.