

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DODOMA

MISC. ECONOMIC CAUSE NO. 1 OF 2017

(Originating from Singida District Court Economic PI No. 174/2016)

1. FATUMA D/O OMARY 2. ASHA D/O ALLY @ ALLY 3. MARIAM D/O MAKAME @ OMARI	} APPLICANTS
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VERSUS

THE REPUBLICRESPONDENT

RULING

14/08/2017 & 15/08/2017

F. N. MATOGOL, J.

The applicants, namely Fatuma Omary, Asha Salim @ Ally and Mariam Makame @ Amri, first, second and third applicant respectively were arraigned in the District Court of Singida charged with one count of Unlawful trafficking in narcotic drugs c/s 15 (1) (b) and (2) of the Drugs control and Enforcement act No. 5 of 2015.

It is alleged that on 5th day of October, 2016 at around 11:40 hrs. at Misikii village along Babati/ Singida road, Kinyamwenda ward

Mungumaji division within the district and region of Singida, the applicants were found unlawfully trafficking 82 bundles' of narcotic drugs, that is the plant commonly known as "mirungi" weighing 24.20 kilograms.

The applicants have come to this court with an application for bail. The application is by chamber summons made under section 148 (1) (3) and (5) (a) (ii) and (iii) of the Criminal Procedure Act, [Cap 20 R.E. 2002], section 29(1) of the Drugs Control and Enforcement Act, No. 5 of 2015 and any other enabling Provisions of the law.

The same is accompanied with three affidavits sworn by the applicants separately.

At the hearing, Ms. Janeth Mgoma learned State Attorney appeared for the respondent/Republic. Mr. Ahmed Athuman Hatibu learned Advocate appeared for the applicants.

Submitting in support of the application apart from what was states in the applicants` affidavits, Mr. Hatibu learned advocate added that the applicants have rights to bail, which is their basic and constitutional right. That the applicants are charged with unlawful trafficking in narcotic drug,that is khat weighting 24.20 Kilograms. That section 29 (1) (b) of the Drugs Control and Enforcement Act, No. 5/2015 permits a person found with narcotic drug specifically khat which is not more than 100 kilograms to be granted bail. The person cannot be granted bail if was found with

khat weighing 100 kilograms and more, which is not the case for the applicants who were found possessing 24.20 kilograms. Mr. Hatibu submitted further that the applicants have never been convicted of any criminal offence and sentenced to imprisonment for three years and above, they have never violated any bail condition after been granted bail. That the applicants are innocent and their rights are protected under Article 13 (6) (b) of the United Republic of Tanzania constitution Mr. Hatibu said for that reason the applicants are entitled to bail. He submitted further that article 15 (1) (2) of the URT constitution guarantee freedom of movement. Thus the applicants freedom of movement can not be curtailed. He therefore prayed that the applicants' application be granted and the applicants be released on bail.

On her part Janeth Mgoma learned State Attorney resisted the application. She submitted that the applicants are charged with the offence of unlawful trafficking in narcotic drugs. They were found possessing 24.20 kilograms of Khat (*Mirungi*). They are charged under section 15 (1) (b) (2) of the above named Act, which confer jurisdiction to this court.

But section 36 (4) (f) of the Economic and organized crime control Act, cap. 200 R.E 2016 prohibits grant of bail far economic offences under Act No. 5/2015.

She said Cap. 200 R.E 2016 was passed after the enactment of the Drugs control and Enforcement Act, No. 5/2015. In passing Cap.

200 R.E 2016, the legislature was aware of the presence of section. 29 (1) (b) which provide for bail. But they saw it important to restrict grant of bail for economic offences by enacting section 36 (1) (f). The learned State Attorney prayed to this court in interpreting the two provisions importance should be placed to the recent legislation and that she asked the court not grant bail to the applicants.

In rejoinder Mr. Hatibu learned counsel did not agree with Ms. Mgoma interpretation of the two provisions, that she said section 36 (4) (f), of Cap. 200 R.E. 2016 prohibit grants of bail to economic cases. Mr. Hatibu said that is her interpretation under the umbrella of the intention of the legislature. However she did not lead any evidence nor produce any document to support her argument such as parliamentary hansard to show such intention of the legislature. That she has conceded that while this law being passed the legislature was aware of the existence of the other law.

But he said, this provision was enacted for the purpose of supplementing the other existing law. That is the offences which are not bailable under Act No. 5 of 2015, the person charged there under should not be granted bail. But was not intended to prohibit grant of bail provided under section 29 (1) (b) of Act No 5/2015.

But also by looking at the two provisions, and the nature of the offence the applicants are facing, which is unlawful trafficking in narcotic drugs c/s 15 (1) of Act No. 5/2015, this is the specific legislation on narcotic drugs offences. Section 29 (1) (b) should be

looked at as specific legislation and not section 36 (4) (f) of Cap. 200 R.E 2016 which is a general law of economic offences. That if the proposed interpretation by the learned State Attorney would be proper; then this would bring contradictions between the two provisions.

Mr. Hatibu submitted further that, it is a trite law that where there exist a lacuna or contradiction between two provisions, then the court has to decide in favour of the accused, that is the applicants in this case.

Having heard from the learned advocate for the applicants as well as the learned State Attorney and after going through the court record. This court is therefore called upon to resolve the conflicting two stand points that submitted by the learned State Attorney as well as that submitted by the learned advocate for the applicants. It is a common ground that the applicants are charged with an economic offence under section 15 (1) (b) and (2) of the Drugs Control and Enforcement Act. It is alleged that they were trafficking in khat weighing 24.20 kilograms. That is one of the narcotic drug. The Drugs Control and Enforcement Act, No. 5/2015 provides under section 29 (1) types of offences in which grant of bail is prohibited.

Section 29(1) (b) provides:-

"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)"***
- (b) That accused is charged of an offence involving trafficking of cannabis, khat and any other prohibited plant weighing one hundred kilogram or more"***

This means therefore that if a person is charged of an offence involving trafficking of cannabis, khat and any other prohibited plants weighing less than 100 kilograms may be granted bail.

It is true that the offence which the applicants are charged with falls under the economic offences. The provision which the learned State Attorney has cited and which she said prohibits grant of bail, that is section 36 (4) (f) reads;-

"36 (4) the court shall not admit any person to bail if;-

(f) If he is charged with the offence under the Drugs Control and Enforcement Act"

Although the above cited provision prohibits grant of bail for a person charged with an offence under the Drugs Control and Enforcement Act, but this provision is couched in general term;

which can be interpreted to prohibit grant of bail to all persons charged with the offence under the above cited Act.

However the Act itself, Act No. 5/2015 has specific provisions which prohibit grant of bail. Section 29(1) (b) is one of them. As it was correctly submitted by Mr. Hatibu learned Advocate, Cap. 200 R.E. 2016 is a general law on economic offences. But Act No. 5/2015 is a specific legislation for offences involving drugs. So section 36 (4) (f) of Cap. 200 R. E 2016 cannot be taken to have repealed or amended section 29 (1) (b) of Act No. 5/2015. The same was passed just to supplement the existing law. Act No. 5/2015 is a comprehensive piece of legislation. As its preamble reads , an Act to make robust legislative rules for efficient and effective control of narcotic drugs and psychotropic substances. It is obvious that if we go with the interpretation suggested by the learned State Attorney then we will end up with two conflicting provisions. And if it happens then the specific provision as against a general provision is to be looked at and be applied.

This is the trite principle of statutory interpretation. I also get support from the decision of the supreme court of Canada in the Case of **Lalonde Vs. SunLife (1992) 3 SCR 261**. In which it was held;-

“This is an appropriate case in which to apply the maxim “generalia specialibus non derogant and give precedence to special Act.....

The principle is therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act give a complete on the subject, the expression of the rule act as an exception to the subject matter of the rule to the general act."

As Act No. 5/2015 which is a special Act on offences relating to drugs, and as the same Act does not prohibit grant of bail to accused charged with offences involving narcotic drugs, specifically khat which does not weigh 100 kilograms and above, then these accused persons may be granted bail, as the offences they stand charged are bailable ones.

The applicants in this case are charged with the offence of trafficking 24.20 kilograms of khat which is less than 100, kilograms, they are therefore entitled to bail

. There are no other reasons advanced by the learned State Attorney which can lead to deny bail to the applicants.

Bail is the accused rights unless the same is statutorily denied; the personal freedom should not be unreasonably curtailed. The applicants are still suspects so far until when they will be found guilty. So they are entitled to bail.

In its discretion to grant bail to the accused or not, the court must apply its judicial mind, taking into consideration all important

factors. And should be free, wise and independent. And should consider only the relevant laws, principles, rules and all circumstances surrounding the case at hand so as to arrive at the just decision, that guarantee proper and fair trial aimed at attaining justice. In granting bail to the accused, the court had to balance the competing interests of the accused as well as that of the state or Republic.

Paramount consideration is to make sure that the accused will continue to attend his/her trial up to the end and that the interests of the society are not prejudiced.

Having state so, I grant the application. The applicants may be released on bail upon fulfilling the following conditions:-

- (1) Each applicant has to execute bail bond in the sum of Tshs. 30,000,000/=
- (2) Each applicant has to furnish two reliable sureties, one must be Government employee who each must execute bail bond in the sum of the Tshs. 30,000,000/=.
- (3) Each surety has to deposit in court title deed of immovable property of value not less than Tshs 30,000,000/=, which is free from any incumbrances and which must be verified by the Registrar of Titles or any other recognized authority of that capacity.

- (4) The applicants should not leave jurisdiction of the District Court of Singida without prior permission of the Resident Magistrate incharge of that court. .
- (5) The applicants have to report to the RCO Singida once in a month.
- (6) The bail documents shall be approved by the Deputy Registry – Dodoma or the Resident Magistrate incharge Singida before the applicants are released on bail.

It is so ordered.




F. N. MATOGOLO
JUDGE

15/08/2017