

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
MISCELLANEOUS CRIMINAL APPLICATION NO 10 OF 2020
BETWEEN

THOMAS MWITA MARWA_____ **APPLICANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

(Arising from economic case no 9 of 2019 pending at the district court of Tarime at Tarime)

RULING

Date of last order; 18.06.2020

Date of Ruling; 03.08.2020

GALEBA, J.

This is an application for bail pending trial of economic case no. 9 of 2019 filed at the district court of Tarime. In that pending matter, the applicant jointly and together with **SERERYA GIMONGE MASANA** and **ABDALLAH OMARI MARUNDA** (the other accused persons) are charged on one count of being found illegally dealing in substances with drug related effects namely **ETHANOL** weighing 12,500 litres, contrary to section 15(1)(b) and (3)(iii) of the **Drug Control and Enforcement Act No. 5 of 2015 as amended by Act No 15 of 2017 (Drug Control Act)** read together with paragraph 23 of the first schedule to the **Economic and Organized Crime Control Act [Cap 200 RE 2002] (the EOCA)**. The offence is alleged to have been

committed on 14.03.2019 at Mpakani Village within Tarime district in Mara region.

The application has been brought under sections 148(3) and 149 of the **Criminal Procedure Act [CAP 20 RE 2019]** (the CPA). On 18.06.2020 Mr. Paul Obwana learned advocate acting for the applicant prayed, and this court granted the order that this application will also be entertained under the provisions of section 29(4)(d) of the **EOCA**. The application is supported by the affidavit sworn by the applicant in which he swears that he is a person of good character and has no criminal record with sufficient number of people who can stand surety for him once granted bail.

When the application came up for hearing on 18.06.2020 as stated above Mr. Obwana appeared for the applicant whereas the respondent was being represented by Mr. Frank Nchanila and Mr. Yese Tember both learned state attorneys.

In support of the application, Mr. Obwana submitted that his client is praying for bail because, first it is his constitutional right under the provisions of **Article 15(1) of the Constitution of United Republic of Tanzania 1977 [Cap 2 RE 2002]** (the Constitution) which provides for a right to freedom and also holding someone in custody is tantamount to affirming that he is guilty. In reply Mr. Nchanila submitted that even the substances (**ETHANOL**) with which the applicant is alleged to have been dealing in is neither a prohibited narcotic drug nor a

precursor chemical. He added that the chemical is not listed at table 7 of **the Industrial and Consumer Chemicals (Management and Control) Act No 3 of 2013 (the Industrial Chemicals Act)**. However Mr. Nchanila submitted that in terms of section 15(1)(b) of the **Drug Control Act** the punishment is life imprisonment. He therefore prayed that although bail may be granted but the same be granted with stiff conditions. In rejoinder Mr. Obwana submitted that his client needs to be given lenient bail conditions.

As the respondent is not disputing that the applicant should not be granted bail that does not become an issue. The issue is what should be the bail conditions and what should guide me to set them. I will start with what should guide the court in setting the bail conditions.

In **MISCELLANEOUS ECONOMIC APPLICATION NO 136 OF 2016 BETWEEN DICKSON ERNEST MAIMU AND 5 OTHERS VERSUS THE REPUBLIC** Feleshi J. (as he then was)) (Dar es Salaam Registry unreported), stated the following principles at page 8 of the typed ruling which I find very useful in the circumstances I have found myself into. He said;

"One may pose to ask as to what is the rationale behind the principle laid by section 148(2) of the CPA (supra). The rationale include the factors like: one, the gravity of the case should be weighed in relation with the possibility by the accused to jump bail for fear of stiff sentence; two, special circumstances viewed from events surrounding both the accused and the victim of crime such as medial grounds, safety of both accused and the victim of crime and the chances to interfere with the ongoing investigation; and three having paid regard to other factors, courts to impose affordable bail conditions."

Mr. Nchanila submitted that the conditions must be tough because, the punishment in case a conviction is achieved is stiff, whereas Mr. Obwana submitted that his client has not been convicted, so he has to enjoy his right to freedom from restraint. I will decide this issue in view of the above case together with **section 15(1)(b) of the Drug Control Act** cited by Mr. Nchanila and **Article 13(6)(b) of the Constitution of the United Republic of Tanzania [Cap RE 2002] (the Constitution).**

Section **15(1)(b) of the Drug Control Act** provides that;

"15-(1) Any person who-

(b) traffics, diverts or illegally deals in any way with precursor chemicals, substances with drug related effects and substances used in the process of manufacturing of drugs; and

(c)n/a

Commits an offence and upon conviction shall be sentenced to life imprisonment."

Article 13(6)(b) of the Constitution provides that;

"(b) ni marufuku kwa mtu aliyeshitakiwa kwa kosa la jinai kutendewa kama mtu mwenye kosa hilo mpaka itakapohibitika kuwa anayo hatia ya kutenda kosa hilo."

These are the provisions of law that are going to be balanced as we proceed. Mr. Nchanila stated that life imprisonment is a threatening punishment, whereas that is how he submitted, but a while previous he has submitted that the substances with which the applicant is charged in dealing with is not an illegal substance in terms of the provisions of the **Drug Control Act** and the **Industrial Chemicals Act**.

That fact, if it is true it undermines the likely chances of conviction of the applicant. However, I must also make it clear here that any issues relating to conviction of the appellant in the pending case are matters beyond the scope of what this court can do in these proceedings. In the circumstances I will take the charge sheet as it is.

Briefly, life imprisonment is not only life imprisonment but it is one's lifetime imprisonment, the length of that imprisonment equals one's entire future lifetime on the planet earth. That imprisonment is a complete excommunication not only from one's family but also the punishment is a complete seclusion from the civil society. Following death sentence in severity, next in line is an imprisonment for life. For sure the punishment is very stiff and it is by all possible imaginations a perpetual extinction of its victim's freedom of movement as long as he remains alive in body. To say it differently, the life sentence is an incentive to absconding court appearances and trial if one is granted bail, especially where one knows, he is guilty of the offence charged, although that is not necessarily the outcome in every circumstance.

I heard both the state attorney's side and that of the applicant's that the materials subject of the charge are not drugs or precursor chemicals, it is not clear why would the prosecution float such an argument because, what that means is that the prosecution have no faith in the charge, and if that is their argument why is the charge there, why are they not withdrawing it and let the applicant free. All

the same, there is, in the subordinate court a pending charge with a stiff sentencing section, which do not convince the court to set lenient conditions.

Because one of the principles to guide refusal or the extent of the conditions to be set is the stiffness of the punishment should the applicant be found guilty as per the case of **DICKSON ERNEST MAIMU**, this court sets the following bail conditions;

1. The applicant shall deposit with the court a title deed(s) in respect of developed land.
 - (a) The land subject of the certificate(s) of title must be situated in Mara region.
 - (b) If the land will be owned by the applicant, his spouse shall deliver to court a written and sworn undertaking that she will have no objection to sale of the land by the government in case the applicant jumps bail.
 - (c) If the land will be the property or properties of a third party or of third parties not being the applicant's, that person(s) (the owner(s) of the land) and his or her or their spouses shall deliver to court sworn commitment(s) that in case the applicant jumps bail the government shall sell the land.
 - (d) The value of the land shall not be less than Tshs 100,000,000/=, which value must be exhibited by a valuation report prepared by a registered valuer, and

2. The applicant shall execute a bond to secure Tshs 100,000,000/= in favour of the Government of Tanzania so that in case he jumps bail any of his assets will be sequestrated, seized and finally sold by the government.
3. The applicant shall present to court, three sureties who will, appear to court in person and each execute a bond of Tshs 10,000,000/= with an undertaking that the applicant, will at all times attend court when required, and in case the applicant does not, each surety agrees to pay Tshs 10,000,000/= or be committed to jail as per the law.
4. Two of the sureties referred to at clause three (3) above must be employed by the central government and the third by the local government. The sureties must be residents of the region of Mara.
5. Once admitted on bail the applicant shall not travel outside the territorial jurisdiction of the district court of Tarime, without a prior permission of that court, and
6. The applicant shall surrender to court his National Identity Card, his Tanzania Driving Licence and his Passport, in case he has these documents and
7. The applicant shall attend to court on all days that the matter will be called before the subordinate court, and

8. Once the district court of Tarime shall be satisfied that the above bail conditions have been fully fulfilled, it shall release the applicant on bail.

DATED at MUSOMA this 3rd August 2020



Z. N. Galeba
JUDGE
03.08.2020

Court; This ruling was reserved for delivery on Friday 31st July 2020 and it was ready for delivery; but as it turned out to be **Eid el-Adha**, an Islamic Festival of the Sacrifice, and therefore a Public Holiday in Tanzania, this ruling was delivered on Monday, 3rd August 2020 which was the immediate next following working day. The same was delivered in the absence of parties but the ruling was ready for collection by both parties on the same day.



Z. N. Galeba
JUDGE
03.08.2020