

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 12 OF 2020

(Origin; Economic Crime Case No. 6 of 2019, Resident Magistrate's Court of Kibaha)

PASCHAL PETER LUFUNGA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of last order: 18/3/2020

Date of Ruling: 26/03/2020

S.M. KULITA, J.

This is an application for bail pending trial of the Economic Case No. 6 of 2019 of Kibaha Resident Magistrate's Court. The application has been filled by PASCHAL PETER LUFUNGA, the applicant. It has been made under sections 29(4)(d) and 36(1) of the Economic and Organized Crime Control Act [Cap 200

R.E. 2002]. In the said application the applicant prays for the following orders to be granted by this court;

- (i) That this court grant him bail pending his trial at the Residents Magistrate's Court.
- (ii) That this court put reasonable conditions to the applicant.
- (iii) Any other relief or orders as this court may deem fit to grant.

The application is made by chamber summons supported by an affidavit sworn by Mr. Mafuru Mafuru, Advocate. During trial the applicant was represented by the Learned Counsel Mr. Shanyangi Alfred. The respondent, republic was represented by the Learned State Attorney Ms. Monica Ndakidemu.

In his oral submissions Advocate for the applicant Mr. Shanyangi Alfred prayed for the affidavit sworn by Mr. Mafuru Mafuru, Advocate on the 13th day of January, 2020 to be adopted as part of his submission. In the said affidavit it was stated that on the 29th November, 2019 the applicant was charged with ***Trafficking of Narcotic Drugs*** namely Heroin Hydrochloride contrary to section 15 (1) (a) of the Drugs Control and Enforcement Act No. 5 of 2015, as amended by paragraph 23 of the First Schedule to and section 57(1) of the Economic and Organized Crime Control Act [Cap 200 R.E.

2002], at the Resident Magistrate's Court of Kibaha. That the Resident Magistrate's Court of Kibaha does not have the jurisdiction to try the offence and no consent to confer jurisdiction has been issued to the said court to try the offence, hence bail application could not be determined. It was further stated that the applicant is an innocent citizen with good character. He has no criminal records and has a family which depends on him and that the applicant is a businessman by occupation. It was also stated in the affidavit that the applicant is eager to cooperate with the investigation authorities and that he is willing to comply with the bail conditions which will be imposed by this court with consideration that he is innocent unless proved guilty. Apart from those statements in the affidavit as sworn by the deponent Mr. Shanyangi Alfred, Advocate added that the offence charged against the applicant is bailable and no certificate to object bail has been issued by the Director of Public Prosecution (DPP). The Advocate cited article 13(6) of the constitution of the United Republic of Tanzania, 1977 stating that the presumption of innocence should be considered by this court and grant bail to the applicant as it is his basic right. He added that the only important thing is a turn up of the accused person (applicant) to court on the date that he is required. He cited the case of **PETER V. R [1975] HCD 391** to support his argument. He

also cited the cases of **DAUDI PETE V. R [1979] TLR 22** and that of **HASSAN MBAGA CHOMOKA V. R, Misc. Economic Cause No. 51 of 2018 (unreported)**. The learned Counsel concluded his submission by praying for the applicant to be released on bail.

In reply to this application, the Respondent filed a counter affidavit sworn by Ms. Monica Ndakidemu, the Learned State Attorney for the Republic. The said counsel prayed for the contents of her counter affidavit to be adopted as part of her submissions. She said that due to the seriousness of the offence there is a possibility for the applicant to abscond bail. The counsel also stated that the offence which the applicant has been charged with is unbailable. She submitted that the respondent objects this bail application on the ground that the applicant is charged under section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015, paragraph 23 of the first schedule and section 57(1) of the Economic and Organized Crimes Control Act, which prohibits bail to the person charged with Trafficking Narcotic drugs where in case of conviction the penalty is at least 30 years imprisonment.

Ms. Ndakidemu submitted that the issue of bail is governed by section 148 of the Criminal Procedure Act and the offence

charged against the applicant is among the offences of which bail is restricted as per the aforementioned provision.

The counsel further submitted that section 36(1) of the Economic and Organized Crimes Control Act provides for the circumstances under which bail can be granted which is not applicable to the matter at hand.

Ms. Ndakidemu concluded her submission by praying for this bail application to be dismissed.

In the rejoinder the applicant's counsel submitted that the applicant is charged under the Economic and Organized Crimes Control Act, in which this court has jurisdiction to entertain bail. He said that if the DPP had an objection in respect of bail to the applicant he would have filed a certificate.

Upon receiving the submissions from both parties in respect of this application for bail, I got the following observation; As a general rule section 148(5)(a)(ii) of the Criminal Procedure Act restricts bail in respect of the offence that the applicant stands charged. However, section 29 of the Drugs Control and Enforcement Act requires the court not to grant bail to the accused where the weight of the narcotic drugs he was found trafficking exceeds 20 grams. The copy of annexed charge sheet of the trial court indicates that the applicant is alleged of

trafficking the narcotic drugs weighting 133.33 grams. It means the applicant cannot be released on bail as the drugs he was found trafficking exceeds 20 grams.

I agree with the applicant's learned counsel that the applicant should be presumed innocent until proven guilty but his allegation that the offence of trafficking drugs is bailable is a misconception by the Learned Counsel Shanyangi Alfred. This is due to the clear fact that weight of the drugs which is a subject matter of the case exceeds 20 grams. Thus, rejection of bail to the applicant is an issue of legal requirement and not denial of presumption of innocence to him by the court. Grant of bail to the accused is clearly restricted to the weight of the narcotic drugs alleged to have been trafficked. The fact that the applicant was found trafficking 133.33 grams he cannot be released on bail.

Therefore the applicant cannot be released on bail as the grant will contravene the provision of section 29(1)(a) of the Drugs Control and Enforcement Act, 2015, read together with the Criminal Procedure Act [Cap 20 RE 2002] at section 148(5)(a)(ii). In **RAMADHAN MUSA KABADAN @BONGE & ANOTHER V. REPUBLIC, Misc. Criminal Application No. 185 of 2019, High Court at DSM (unreported)** the presiding Judge dismissed the application for bail as the

applicant was alleged to have been found trafficking drugs weighing over 20 grams.

I therefore concede with the submission of the respondent's Counsel that this bail application is restricted by the provisions of section 148(5)(a)(ii) of the Criminal Procedure Act, and section 29(1)(a) of the Drugs Control and Enforcement Act, 2015.

Having so said I find this application has no merit and the same is hereby dismissed.



S.M. KULITA

JUDGE

26/03/2020