

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU**

**CRIMINAL APPLICATION NO. 116 OF 2023
(From Criminal case No. 54 of 2023)**

**1. ABRAHMAN JUMA ALI
2. IBRAHIM ABDALLA SALEH APPLICANTS**

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

R U L I N G O F T H E C O U R T

29th Jan, & 14th Feb, 2024

H S.K. Tetere J.:

This is a ruling for bail application pending trial. Mrss. Abraham Juma Ali and Ibrahim Abdalla Saleh, the Applicants herein are charged with the offence of murder contrary to the section 179 and 180 of the penal Act No. 6 of 2018 in criminal case No. 54 of 2023. The application has been lodged by way of chamber summon pursuant to section 152 (1) & (2) and 225(1) of the CPA No. 7 of 2018. The affidavit in support of the application was sworn by the learned counsel Mr. Abdul-haliq Mohamed Aley.

The Respondent filed counter affidavit sworn by Ms Dawa Suleiman Keis, Principal state Attorney resisted the application.

At the hearing of the application, the Applicants were represented by Mr. Abdul-haliq M. Aley, the learned counsel whereas Ms Dawa Suleiman Keis Principal State Attorney assisted with Ms Arafa Zubeir Senior State Attorney entered appearance for the respondent.

Mr. Aley, began his submission by adopting the contents of the chamber summon and the supporting affidavit and urged the court to find and hold that the supporting affidavit has not been objected by the respondent on the ground that the counter affidavit is defective for want of proper verification.

In elaboration, the learned counsel argued that it is trite law that the affidavit must be verified but the present counter affidavit lacks signature of the deponent and therefore in the eye of the law there is no verification. He further argued that the proper verification must be signed but in the Respondent's counter affidavit there is verification paragraph only but the deponent's signature is missing. He asked the court to hold that there is no counter affidavit at all. He is on the view that whenever there is no contested affidavit, technically the application has not been objected. He therefore prayed the applicants to be granted bail.

He also argued that the Applicants have been in the custody for more than six months and the trial has not commenced. He stresses that for Applicants being in remand for the period of six months without trial they are entitled to bail as required by law. He asked the court to refer paragraph 4 and 5 of the Applicant's affidavit.

In response, Ms. Dawa Suleiman, Principal State Attorney submitted that the verification clause is there as the signature is shown at the time of taking oath. She further submitted that the counter affidavit being signed at the bottom of verification paragraph is a civil technicality and didn't offend any provision in criminal procedure. She therefore asked the court to find that the counter affidavit is objected the application and its verification clause is proper in the eye of the law.

Reply to the merit of the application, the Principal State Attorney submitted that the Applicant's case was first filed in court in August 2023 and present application filed on 22 January 2023. Therefore, the period of six months has not lapse. She also argued that the delay to commence trial was not caused by the prosecution side but it was made by the court and accused person instead. She therefore prayed the bail application shouldn't be granted as the period of six months has not lapse.

In his brief rejoinder, Mr. Aley, the learned counsel for Applicants was humbly prayed to interpret section 152(-1) of CPA and insisted that the time is counted from the date of the arrest. On the issue of the delay, the learned counsel discounted the claims that the delay was also caused by the accused person/Applicants.

After having heard the respected submissions from the parties, I find it wise first to determine the point of verification clause as raised by the learned counsel for Applicants.

Verification clause is one among the essential ingredient of the valid affidavit in court. As correctly argued by PSA that our criminal procedure Act No. 7 of 2018 has no provision that govern the filing of affidavit in criminal application in court. However, the same matter has been dealt by the court of appeal in numerous decisions. In the case of **Director of Public Prosecutions v. Dodoli Kapufi and another, Criminal Application No. 11 of 2008 (unreported)**, that: The essential ingredients of any valid affidavit, therefore, have always been:-

- (i) the statement or declaration of facts,
etc, by the deponent;

(ii) **a verification clause,**

(iii) a jurat, and

(iv) **the signatures of the deponent and**

the person who in law is authorized

either to administer the oath or to

accept the affirmation.

The above position has been also taken by this court in the case of **Ramadhan Khamis Juma Vs Director of Public Prosecutions, Criminal Application No. 35 of 2020, (Unreported)** where my sister Judge **(A. I. S. Sued J.)**, consulted Order VI, Rule 15 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar as a relevant provision for verification clause. The said provisions, provide for a mandatory requirement for the verification clause and the same should be signed by person making it and state the date on which and the place at which it was signed.

In the present application, Respondent's counter affidavit missed this essential ingredient as the verification clause has not been signed by a person deposed the affidavit.

Being persuaded by the above cited authorities, I'm in agreement with Mr. Aley, the learned counsel for Applicants that the Respondent's counter affidavit is incurably defective for want of proper verification clause. Having said that, I find the point of verification raised to have merit and it is hereby sustained. Accordingly, I strike out the Respondent's counter affidavit save for the matter of laws raised at the hearing of application.

Now, having strike out the Respondent's counter affidavit, the supporting affidavit remain uncontested and determination of this matter will be based on the chamber summons, supporting affidavit and submission of the parties. Thus, the issue for determination is whether the applicants have advanced good cause warranting this Court grant them bail as prayed in terms of section 152 (1) & (2) and 225(1) of the CPA No. 7 of 2018.

To answer that question, it is important to make reference with the above cited provisions. It reads as follows: -

152 – (1) "the hearing of a case in which a person is charged with non bailable offence must be commence within six months from the date when a person so charged was arrested.

(2) if the hearing does not commence within the said period of six months, the accused person shall be admitted to bail unless the court, for reasons to be recorded in writing direct otherwise."

A close reading of the above cited provisions, shows that two situations are provided within which a bail can be provided by the court. **First**, failure to commence trial within six months from the date of arrest of the accused person. **Second**, discretionary power of the court advanced with reasons. However, for the first situation to apply, there must be clear record that six months period has lapse without a trial and for second situation it saves power of the court to exercise its discretion of not granting bail even if six months period has lapsed. Admittedly, as a matter of discretion the court is bound to exercise its discretion judicially.

In the present matter, the records show that the applicants were firstly brought to Court on 17th August, 2023 before the Deputy Registrar and the present application was filed in court on 22 December 2023. This makes differences of four months and five days.

The paragraph 4 and 5 of supporting affidavit provided that the first and second Applicant have been arrested and kept in police custody since 20th May, 2023 and 15th June, 2023 respectively. The present application was filed in court on 22nd December, 2023. This makes differences of seven months and two days to the former and six months and seven days to the latter. For better references, I think it is worth to reproduce them hereunder:

(4) "that the First accused was arrested by police and was kept under custody at Mashine ya maji Fuoni Police post from 20th of May, 2023 to the day he was taken to Court for the first time for allegation of Murder of one Mohammed Hussein Hassan. That the First Applicant/accused was then sent to Kilimani Chuo Cha Mafunzo Urban District of Unguja Zanzibar under a prison police custody.

(5) "that the second accused/Applicant was arrested by police and was kept under custody at Mwera Police post before the 15th of June, 2023. That later of after a period of one week the second Accused was transferred to Mazizini Police Post to the day he was taken to court in the middle of August, 2023 for the first time for the accusation of murder of one Mohamed Hussein Hassan. That the First Applicant/Accused was then sent to Kilimani

*Chuo Cha Mafunzo urban District of Unguja
Zanzibar under a prison police custody”.*

Having closely examining the contents of paragraphs 4 and 5 of supporting affidavit, this court is not satisfied enough that the above presents convincing facts of the matter. Suffice to state that if what have been stated above is the oral evidence, one would have expected evidence or particular of facts from a Police station where the Applicants have been kept before they were present in court. In absence of that evidence, this court is reluctant to endorse the argument that the applicants have been arrested for more than six months.

Therefore, the proper record that this court could relied on is in the case file and the same shows that the differences of four months and five days. Thus, as correctly argued by PSA for the Respondent, that the period of six months prescribed by law has not lapsed.

Consequently, that is being the position, I find this application is premature before this court and the applicants are advised to apply the same at the appropriate time for consideration. In view of the foregoing, the application is thus failed and it is hereby strikeout.

It is accordingly ordered.

DATED at ZANZIBAR this 14th day of February, 2024.

Sgd: **H.S.K. TETERE-J**

14/02/2024

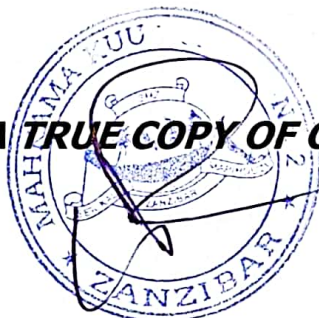
Delivered in the presence of Mrs. Hariri Yushau Ali, learned State Attorney for DPP and in the presence of the accused and his advocate, Mr. Abdulkhaliq M. Alley.

Right of Appeal is Explained.

Sgd: **H.S.K. TETERE-J**

14/02/2024

I CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL.



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REGISTRAR HIGH COURT
ZANZIBAR.