

IN THE HIGH COURT OF ZANZIBAR

HELD AT CHAKE CHAKE

CRIMINAL APPLICATION NUMBER 01 OF 2024

ZANZIBAR DRUGS CONTROL AND ENFORCEMENT AUTHORITY.....APPLICANT

VERSUS

ABDALLA SAID ABDALLA.....RESPONDENT

RULING

16th August, 2024 & 22nd August, 2024

BAKARI, J

The **Zanzibar Drugs Control and Enforcement Authority** (hereinafter to be referred to as **Applicant/ZDCEA**), has filed this application before this Court against the one **Abdalla Said Abdalla** (herein to be referred to as the **Respondent**) praying for the following orders:

- i. That, this Court should issue an urgent order to send the respondent to the Zanzibar Education Centre until his co – suspect by the name of Juma Said Maulid is found so as to hear their case registered as ZDCEA/HQ.P/IR/037/2023.
- ii. Any other order as the Court deems fit to issue in favour of the applicant.

The application is filed under certificate of urgency and it is supported by the affidavit sworn by the legal officer Rukia Ali Khamis. In this matter, the applicant is represented by the Legal Officers Moh'd Mzee and Rukia Khamis while the Respondent is represented by his advocate Saleh Said Moh'd and Zaharan Moh'd.

The Legal Officer Rukia Khamis on behalf of the applicant swore that, on 16th August, 2023, at about 3:30 PM, the respondent together with his co – suspect Juma Said Maulid were arrested at Misufini areas Chake Chake in connection with the offense of possession of narcotic drugs of Bhangi weighing 5,826. She went on swearing that, while the investigation was going on, the respondent and his said co – suspect were granted bail by the ZDCEA as proved by the exhibit **"ZDCEA.1"** attached to the affidavit.

She continued to swear that, the respondent escaped from Pemba and that, for a period of one year, the ZDCEA was taking several efforts to secure his arrest until 29th July, 2024 when the applicant/ ZDCEA found and arrested him at Dar es Salaam where he went on hiding. She said, the respondent was taken back to Pemba and sent to the applicant's /ZDCEA's Office on 31st July, 2024 for prosecution processes together with his co – suspect Juma Said Maulid.

Ms. Rukia had gone on averring that, when the respondent's co – suspect Juma Said Maulid was informed to report at the ZDCEA's Office, he jumped bail and escaped whereby, at the moment the applicant is busy to trace his whereabouts for the purpose of putting him under arrest as proved by several documents of correspondences attached to the affidavit as annexure "**ZDCEA 2**".

Ms. Rukia insisted in the affidavit that, the ZDCEA makes concerted efforts to secure the arrest of the suspect Juma Said Maulid so as to be connected together with the respondent and brought to court to face their charges.

The respondent filed the counter affidavit which has been sworn on his behalf by his advocate Masoud Moh'd Said from Home Land & Associates Advocates Chake Chake Pemba. However, before proceeding with the reply of the affidavit, Mr. Masoud raised legal concern that, **the applicant's affidavit is incurably defective.**

Replying to the first clause of the affidavit, advocate Masoud swore that, he is not in a position to agree or believe the context of the first (1) clause; however, he agreed the second clause of the affidavit. Regarding clauses number 3, 4, 5 and 6 of the affidavit, the advocate strictly denied them.

During the hearing of matter, the court in agreement with the advocates of the parties agreed that, the hearing of the legal concerns will made concurrently with the presentations of the submissions and that, the court will determine the concerns prior to the decision on merit of the application.

Mr. Moh'd Mzee for the applicant started the submission by saying that, the application is made under section 160 of the Act No. 7/2024 and other enabling provisions. He said, the applicant among other things prays that, the respondent be sent to Education Centre/prison until the suspect no. 1 one Juma Said Maulid which is the respondent's colleague is arrested and brought to court. He said, the application is supported by an affidavit and prayed the court to adopt the same as part of their submission.

According to Mr. Mzee, the applicant prays for the respondent to remain in custody for two main reasons stated in their affidavit, these are:

Firstly, on 16th August, 2023, at about 3:30 PM, the respondent together with his colleague Juma Said Maulid were arrested in connection with the offences of trafficking and possession of narcotic drugs of bhangi weighing 5826 grams. He said, while the investigation into the allegations was still in progress, the respondent and his co – suspect were granted bail whereby, the respondent was bailed out by his father Said Abdalla Salim and his wife Khadija Hamid Mohamed. He has told the court that, due to wit the respondent and his colleague were required to report at the ZDCEA's Office Pemba at any time needed.

Apart from that, Mr Moh'd added, the respondent was required to ask for the ZDCEA's permission to travel outside Pemba in case of emergency. However, Mr. Moh'd submitted that, after being admitted to bail, the respondent breached bail conditions and escaped outside Pemba nearly a year now.

Mr. Moh'd submitted that, the respondent was arrested at Dar es Salaam at 29/07/2024 and taken to Unguja and later on sent to Pemba at the Applicant/ZDCEA's office so as to be connected and properly charged and brought to court together with his fellow suspect Juma Said Maulid who is a prime suspect (suspect no. 1). He has told the court that, the sad thing is that, after the said suspect no. 1 Juma Said Maulid who used to attend the ZDCEA/applicant's office regularly whenever he was needed, jumped bail as well, and escaped into the unknown location so as to hamper the process of taking them to court.

The Legal Officer Moh'd proceeded by requesting the court to let know that, after the respondent jumped bail, the applicant took various nonforcible measures like sending call letter/correspondence to the Ministry of Trade Pemba to which the respondent works with a view of having him report at the applicant's (ZDCEA) office, but in vain.

Secondly, Mr. Moh'd said, they want the court to order the respondent to remain in custody because, the said respondent's colleague/ suspect no. 1, has jumped bail as well and escaped, where till now, he is not yet captured. He reiterated on insisting that, the applicant (ZDCEA) makes a deliberate efforts to trace his whereabouts so that he can be arrested and brought to court to answer the case originated from the complaint ZDCEA/HQ.P/IR 37/2023 filed at the ZDCEA/applicant's office Pemba. He prayed the court to grant the application.

Ms. Rukia Ali who is the applicant's Legal Officer assisting the Legal Officer Moh'd Mzee, on her additional submission stated that, the applicant brought the application because, the respondent had earlier breached the bail conditions and absconded something which delayed their case of which, its investigation has already been completed to allow them to be brought to court. She said, the applicant used resources and incurred costs to find the respondent and arrested him and then, brought him to Pemba on 31/07/2024 after his arrest on 27/07/2024 at Dar es Salaam.

She emphasized that, they intend to bring the respondent to court but, the first suspect one Maulid who is the prime suspect must be found first so that, the later and the former could be charged together and brought to court. Like her fellow Legal Officer Mr Mzee said, Ms. Rukia prayed the court to order that, the respondent should be put behind bars on the Zanzibar Education Centre till such time when the respondent's colleague who is the suspect no. 1 is arrested and brought to court.

Advocate Saleh, on behalf of the respondent, had strongly objected the application and, before embarking on the merit of the same, he started his submission by submitting his concerns against the applicant's affidavit. He said, the applicant's affidavit is incurably defective on the following grounds, these are:

- i) The deponent Rukia Ali Khamis has sworn without specifying her religious belief. He said, the deponent is required to state in which religious belief he/she swears the affidavit;
- ii) The deponent Rukia Ali Khamis in para. 1 of the affidavit, has just stated that, she represents the applicant but she did not mention her position status;
- iii) Para. 6 of the affidavit contains prayers;
- iv) the deponent did not show in the verification, her connection or relationship with the applicant, and;
- v) Before embarking on the jurat, the deponent Rukia did not swear by the paragraphs or clauses of her affidavit.

As to the merit of the application, advocate Saleh submitted that, the material wording of the chamber application is that, the applicant wants the respondent to be committed to the Education Centre pending his co – suspect to be found and arrested. He said, this means that, the respondent should be kept in custody simply because, his colleague has not yet been captured.

Advocate Saleh, had further submitted that, Sec. 160 Of the Criminal Procedure Act No. 7/2018 to which the applicant used to bring the application is not compatible with this application. He said, such provision did not say if one suspect absconds, thus the co – suspect should be detained. He elaborated further that, the basis of the Section 160 (supra), is the existence of a case in court or it is applicable only for cases filed in court and not for suspicions or complaints that are still being investigated by the Authorities. In addition to that he said, the content of Sec. 160 of the Act (supra) seems not be mandatory as the same reads *"...the court may cause him to be arrested and may commit him to prison ..."*

He added that, in this scenario, there is no case filed in court but suspicion that led the respondent to be in custody for more than three weeks. Thus, he said, the provision used by the applicant to move the court is a wrong one. Mr. Saleh had gone on telling the court that, what the applicant wants is for the court to rectify the illegal thing to be legal. He said, there are procedures to be followed in case a suspect jumps bail as well as procedures for extension of time to continue holding a suspect under investigation as per Section 39 of the Act No. 7/2018 (CPA).

Advocate Saleh continued to state that, the applicant has failed to show in their affidavit when they will arrest the first suspect and why the respondent should bear the sins of his co – suspect by continuing to be kept behind bars until his colleague is captured. To cement his argument, advocate Saleh cited Section 12 (6) (b) of the Constitution of Zanzibar of 1984 as amended from time to time which provides:

"Mtu aliyeshtakiwa kwa kosa la jinai hatatendewa kama mtu mwenye kosa hilo mpaka itakapothibitika kuwa, anayo hatia ya kutenda kosa hilo", which can be translated in english as *"A person charged of criminal offense shall not be treated as a person who comitted such offense until proven guilty of committing that offense* (translation to english is mine).

Again, advocate Saleh submitted that, the applicant did not state the case position in the sense that, the applicant's affidavit does not show at what stage the said purported case to be filed against the respondent and his colleague has reached. Instead, he said, the applicant stated that, they are doing efforts to make sure that, they arrest the first suspect something which is not sufficient.

In relation to the annexures attached to the applicant's affidavit, Mr. Saleh has told the court that, they have no relation to the respondent and others like a letter sent to the respondent's Employer/Ministry of Trade Pemba have no proof to have been received by the Ministry. Lastly, he prayed the court not to grant the application.

In rejoinder, Legal officer Moh'd for the applicant, started by replying two legal concerns of the respondent to wit the **religious belief** and **status/position**. With regard to the concern that, the deponent Rukia Ali Khamis has sworn without specifying her religious belief, he said, there is no need for the deponent to disclose his religious belief in the affidavit and thus, he said, the affidavit is proper.

As to the second concern which states that, the deponent Rukia Ali Khamis in para. 1 of the affidavit has just stated that, she represents the applicant but she did not mention her position or status; Mr. Moh'd stated that, since the deponent stated that, she represents the applicant, thus the court should take judicial notice that, she is a legal officer of the applicant/ZFCEA.

Replying on the merit of the application, Mr. Moh'd stated that, the basis for praying the court to order the respondent to be held in custody is not because the respondent's co-suspect has jumped bail and absconded but it is on the reason that, the respondent had once given bail by the ZDCEA and escaped.

Regarding the argument of the respondent's advocate that, Section 160 of the CPA is not a proper provision to move the court to order the detention of the suspect, Mr Moh'd stated that, it is the duty of the court to interpret on the correctness of the provision. On the issue that the letters sent the respondent's Ministry of Trade were not received, he said, the same were received by the Ministry. He kept on insisting that, the applicant has the keen interest to bring the respondent to court. He prayed the court to grant the application.

On his part Ms. Rukia for the applicant had this rejoinder:

Regarding her status or position in the affidavit, she stated that, in the affidavit she said, she is a Legal Officer. Also she said, the Magistrate confirmed in the jurat, that she did swear the affidavit. As regards to the development of the purported case against the respondent, she said, the investigation has been completed and the case file is ready. She said, some thing which obstructed the case to be brought to court is that, the respondent had once jumped bail and also the respondent's colleague jumped bail and escaped as well. She said, this is a conspiracy done by the respondent and his colleague to delay the case to be brought to court. Regarding Sec. 160 of the CPA as to whatever it is the moving section or not, she said, it is the court which can interpret it or it can use any other provision considering the gravity of the suspicion.

Having gone in depth the affidavits of the parties together with their submissions, the court is of the views that, the points of determination in this matter are:

- i) whether the legal concerns raised by the respondent against the applicant's affidavit are tenable, and;
- ii) Whether the applicant has established sufficient grounds for this application to be granted.

Starting with the point number 1 (one) as to **whether the legal concerns against the applicant's affidavit are tenable**, our guiding authority is the case of **DPP vs Dodoli Kafupi and Another**, Criminal Application No. 11 of 2008, CAT at Dar es Salaam, where the Court stated as quoted hereunder:

"The essential ingredients of any valid affidavit, therefore, have always been:-

- i) the statement or declaration of facts, e.t.c, by the deponent;*
- ii) a verification clause,*
- iii) a jurat, and*
- iv) the signature of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."*

Coming to the first concern which is about failure of the deponent to disclose her religious belief in the affidavit, I find it as not tenable and refused, because it is not among the essential ingredients of valid affidavit as stated in the case of Dodoli Kafupi (supra).

Regarding the second concern, I will congeal it with the fourth concern and it will read together, as the deponent has failed to mention her position/status as well as her relationship with the applicant in the affidavit. In determining this, I'm saying that, the same is found as baseless and it fails, because although the relationship and status were not mentioned as essential ingredients of a valid affidavit as per Dodoli Kafupi's case (supra), but the deponent Rukiya specified in both verification and jurat of her affidavit that, she is a Legal Officer of the ZDCEA.

As to the third concern that, Paragraph 6 of the affidavit contains prayers; I do admit that, paragraph 6 of the applicant's affidavit contains prayers as rightly argued by the respondent's advocate. In the case of **Uganda v Commissioner of Prisons, Ex-Parte Matovu**, [1966] 1 EA 514 ... the High Court of Uganda held:

"With respect to prayers contained in the affidavit, prayers have to be made in court at the hearing otherwise there is no point in making the application. So

making them prematurely in an affidavit should not be a reason for avoiding determination of the application" [Emphasis is mine].

In the same vein, the Court of Appeal of Tanzania in **Jamal S. Nkumba & Another v Attorney General**, (Civil Application 240 of 2019 [2021] TZCA 756 (Tanzlii 15 December 2021)), the Court held:

"It is now settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraphs is inconsequential."

On the guidance of the above cited authorities, I find that paragraph no. 6 of the applicant's affidavit contains prayers and I duly expunge it and hence, the concern seems to have no merit and refused.

In relation to the fifth concern which states that, before embarking on the jurat, the deponent Rukia did not swear in general terms the whole paragraphs or clauses of her affidavit, I'm saying that, the concern holds no water at all, because at the beginning of her affidavit, she begun by saying **ninaapa** (i.e I swear) meaning that, she swears by each clause/paragraph of her affidavit. In addition to that, the Regional Magistrate/Commissioner for Oaths confirmed in the jurat that, the deponent has sworn before him. For that reasons, the deponent has sworn to all the clauses/paragraphs of her affidavit and thus, the concern is refused. Thus, in totality the respondent's concern against the applicant's application have been overruled.

Now, coming to the merit of the application, it is quite clear that, the application is made under section 160 of the Criminal Procedure Act, No. 7/2018 (herein to be referred to as CPA) which provides:

*"if it is made to appear to any court, by information on oath, that any person bound by recognizance is about to leave Zanzibar, **the court may cause him to be arrested and may commit him to prison until the end of the trial,** unless the court deems fit to admit him to bail upon further recognizance."*
[Emphasis is added].

Admittedly, the material wording of the above provision has tempted me to concur with advocate Saleh for the respondent that, the provision is applicable where the case against a suspect has been filed and continues in court and not for a suspect who is under investigation in other Law Enforcement Organs like ZDCEA. In the same vein, the provision does not make it mandatory for the suspect or accused who has jumped bail

and absconded to be detained, but he may be admitted to bail subject to additional or further bail conditions.

According to the affidavit and submissions made in court, the applicant wants the respondent to be held in custody for two main reasons, viz:

- i) The respondent had once given bail by the applicant and absconded, and;
- ii) The respondent's co-suspect has been bailed in the past as well, but, he absconded and he is still at large.

With the regard to the issue that, the respondent was given bail and absconded, I think that is not the reason to detain the respondent, because the CPA has given guidance in case the a suspect or accused jumps bail like forfeiture of recognizance and require a suspect or accused to find new reliable sureties. To speak the truth, committing the suspect or accused to restraint should be the last resort.

Concerning the fact that, the respondent's colleague absconded bail and not yet found, I think, that issue has nothing to do with the respondent as the swahili saying goes "**hatobeba mbebaji mzigo wa mtu mwengine**" (i.e a person shall not carry a burden of another) or **kila mtu atabeba mzigo wake** (i.e every one shall carry his/her own load). In this matter, the applicant inspite of explaining that, they make efforts to find the respondent's colleague, but their affidavit does not show when they will arrest him. Coupled to that, according to their affidavit (Applicant's affidavit), they do not understand his whereabouts. That's tantamount to say, the applicant wants the court to bless the respondent to be detained for an indefinite period of time something which is not legally acceptable.

In view of the forgoing reasons, the court is of the opinion that, the applicant has failed to establish sufficient grounds for this application to be granted. Thus, considering the fact that, the respondent is a mere suspect who is under investigation where the procedures of prosecuting him in the court have not yet been completed, furthermore, bearing in mind that, it is unknown when his co-suspect would be arrested and joined with him in the charges and brought them in court, thus, the applicant's application is refused and the following orders are issued:

1. The Applicant/ZDCEA is ordered to charge and bring the respondent to court to answer the said charges forthwith, or else, the applicant/ZDCEA is ordered to admit the respondent to bail with reasonable bail conditions and with new reliable sureties.
2. It is insisted that, bail conditions should be reasonable and implementable ones.

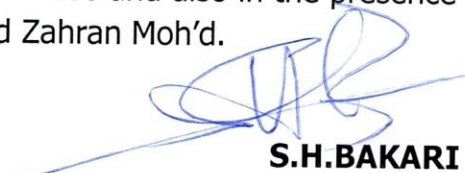
It is so ordered.


S.H.BAKARI
JUDGE
22/08/2024



Court:

The ruling delivered this 22nd August, 2024 in the presence of the Applicant's/ZDCEA Legal Officer Moh'd Mzee and also in the presence of the Respondent and his advocates Saleh S. Moh'd and Zahran Moh'd.


S.H.BAKARI
JUDGE
22/08/2024



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