

IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT VUGA
CRIMINAL APPLICATION NO. 7 OF 2014

1. ABDULRAHMAN THANI MATAR

2. MOH'D THAN MATAR **APPLICANTS**

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION **RESPONDENT**

Date of last order 27/10/2014

Date of Ruling 07/11/2014

RULING

MWAMPASHI, J.

The applicants namely Abdulrahman Thani Mattar and Mohammed Thani Mattar who are being charged with the murder of Francios Denis Robert and Brigitte Meny c/ss 196 and 197 of the Penal Act, 2004 (Act No 6/2004) of the Laws of Zanzibar and whose case is still under preliminaries before the High Court Registrar have filed this application under S.150(4) of the Criminal Procedure Act, 2004 (Act No. 7/2004) of the laws of Zanzibar for the court's direction that they be admitted to bail. The application is supported by an affidavit affirmed by the applicant's biological sister one Umul-kulthum Than Mattar and at the hearing of this application the applicants were represented by Mr. Omar Said learned counsel while Mr. Mohammed Saleh learned State Attorney appeared for the respondent DPP.

According to the supporting affidavit the charge was read over and explained to the applicants by the High Court Registrar on 05/02/2014 and

since then their case is being conducted before the Registrar for preliminaries before it is committed to this court for trial. It is also stated in the affidavit that the applicants have been prompted to file this application before this court because admission to bail on the charge of murder can only be directed by the High Court under S. 150(4) of the Criminal Procedure Act, 2004. It is further stated in the supporting affidavit that the applicants who were born and bred in Zanzibar and who have all their assets and businesses here in Zanzibar are persons of good character with no criminal record, they have wives, parents and children who are dependent on them, they have been in remand prison for nearly eight months and were not forcibly arrested. It is also stated in the supporting affidavit that the applicants have to be admitted to bail because their continued incarceration will only be a denial of their constitutional right to freedom of movement and the right to be presumed innocent.

The supporting affidavit was adopted by Mr. Omar Said as part of his submission in support of the application. On 21/10/2014 when this application was called for mention Mr. Mohammed Saleh the learned state attorney for the Respondent DPP prayed for the application to be fixed for hearing because the State wished to file no counter affidavit. On the hearing date Mr. Mohammed Saleh reiterated his earlier stand adding that the State supports the application.

In his submission in support of the application Mr. Omar Said the learned counsel for the applicant argued that the court in exercising its discretion and in deciding whether to grant the application or not should balance the interests of the applicants and that of the state. He also submitted that bail can be denied only when there is concrete evidence from the Prosecution that the applicants do not qualify to be admitted to bail. To cement his arguments Mr. Said referred the court to the case ***Jafar vs. R*** (1972) H.C.D, no 93 where it was held among other things that the primary object of remanding an accused in custody is to ensure that he will appear to take his trial and not seek to evade justice by leaving the jurisdiction of the

court. He insisted that if admitted to bail the applicants to this application will always be readily available to take their trial.

It was further submitted by Mr. Said that the applicants have to be admitted to bail as their constitutional right to liberty. He referred the court to Article 14(1) of the Constitution of Zanzibar of 1984 where the right to freedom is guaranteed and to Article 12(6) where the presumption of innocence is recognized. He lastly prayed for the applicants to be admitted to bail because their release will pose no danger to the society and that if denied bail, the applicants will suffer unnecessary sufferings and irreparable damages.

The relevant provisions of law in as far as the application at hand is concerned are S. 150(1) and (4) of the Criminal Procedure Act, 2004 (Act No. 7/2004) under which it is provided as follows;-

150(1) ***When any person, other than a person accused of murder or treason or armed robbery or possession of firearms or drug trafficking, is arrested or detained without warrant by an officer in charge of a police station, or appear or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail.***

(2)...

(3)....

(4) Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate Court or police officer be reduced.

According to S. 150(4) of the Criminal Procedure Act, 2004 persons accused of murder or treason or armed robbery or possession of firearms or drug trafficking, whose bail under S. 150(1) of the Act is prohibited can still be admitted to bail where the High Court so directs. The power of the High Court on bail applications is therefore unlimited. The High Court has jurisdiction and can direct that bail be admitted to accused persons facing any offence existing in our statutes.

As correctly submitted by Mr. Omar Said the central principle or primary consideration in whether or not to admit an accused person to bail is whether if admitted to bail the accused person will be readily available and will attend to court to face his trial. This is the central principle that should always be in the mind of the court when deciding the question of bail. Granting or refusing bail is in the discretion of the court. The discretion of the court should always be exercised judicially and judiciously. In doing so the court applies the relevant law and with the central principle in regard to the requirement that the accused must be readily available to face his trial in mind the court also considers other factors like the severity of the sentence the particular offence carries, the likelihood that the accused might commit another offence if released on bail, the reliability of the sureties, whether his release will adversely affect peace and good order, his domicile, how long has he been in custody, the nature of evidence in support of the charge where hearing has started, his age e.t.c

In capital offences that carry the mandatory sentence of death the court is supposed to consider among other factors the fact that the death is the most severe sentence. Here the court must consider the possibility of an accused absconding for fear of being sentenced to death and executed if convicted. In murder cases the possibility of an accused person even the most courageous and brave accused person to be tempted to jump bail cannot be undermined. It cannot be disputed that the severe sentence the offence carries the greater incentive to abscond.

The right to personal liberty is one of the fundamental human rights but that right cannot surpass the right to life. The right to life is the foundation of all other fundamental human rights and where that right is in issue other rights may be compromised. In murder cases where the right to life of the victim is in issue it is wise that the presence of the accused, while legal formalities are in progress in the whole process of establishing his guilt has to be guaranteed.

I have weighed the grounds raised in support of this application and considered the nature of the offence the applicants face particularly the sentence the offence carries and realized that this is not a fit case for the court to exercise its discretion under S. 150(4) of the Criminal Procedure Act, 2004. It is a considered view of this court that under the circumstances of this matter the grounds raised in support of the application are neither peculiar nor strong enough for the applicants to be admitted to bail on the charge of murder.

The argument that the applicants' right to liberty as enshrined under Article 14(1) of the Constitution of Zanzibar of 1984 is in jeopardy and that the principle of presumption of innocence as provided under Article 12 (6)(b) of the Constitution will be undermined if the applicants are not admitted to bail is, under the circumstances of this matter, non founded. Bail on the offence of murder is lawfully restricted under S. 150 (1) of the Criminal Procedure Act, 2004 and for that case where an accused facing such an offence is so held and is denied bail that cannot necessarily amount to the infringement of his right to liberty as guaranteed by the Constitution. Likewise denial of bail to accused facing murder or any other offences listed under S. 150(1) does not necessarily undermine the principle of the presumption of innocence which is recognized under Article 12(6)(b) of the Constitution. The Court of Appeal of Tanzania in ***DPP vs. Daud Pete*** [1993] TLR 22 held among other things that denying bail to an accused person does not necessarily amount to treating him as a convicted criminal.

Consequently and for the above given reasons the application is hereby refused.

Sdg: Abraham Mwampashi, J.

Judge,

07/11/2014.

Delivered in court this 07/11/2014 in the presence of the applicants with their advocate Mr. Omar Said and also in the presence of Mr. Mohamed Sale (SA) for the respondent DPP.

Sdg: Abraham Mwampashi, J.

Judge,

07/11/2014.

I CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL

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REGISTRAR HIGH COURT

ZANZIBAR.