IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., ORIYO ,J.A., And KAIJAGE,J.A.)

CRIMINAL APPEAL NO. 193 OF 2014

HASSAN OTHMAN HASSAN@HASANOO.....APPELLANT

VERSUS

THE REPUBLIC.....THE RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Dar es Salaam)

(Teemba, J.)

dated 4th April, 2014
in
Criminal Application No.15 of 2013

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JUDGMENT OF THE COURT

25th May, 2015 & 5th February, 2016

KIMARO, J.A.:

This appeal arises from a refusal by the High Court of Tanzania to hear a bail application from the appellant in Criminal Application No.15 of 2013. Honourable Judge Teemba, who heard the application refused to hear the bail application from the appellant on the ground that another judge of the High Court, Judge Muruke, heard a bail application by the appellant in consolidated Criminal Applications No. 109, 114, 115, 117 and

120 of 2012. All applications arose from Economic Crime Case No. 8 of 2012 in which the appellant and other accused persons were charged with three offences in the Court of Resident Magistrate at Kisutu. One of them is conspiracy to commit an offence under the Penal Code, [Cap 16 R.E.2002]. The rest of the offences are leading an organized crime contrary to section 4(a) of the Economic and Organized Crime Control Act and unlawful dealing in trophy contrary to sections 80 and 84 of the Wildlife Conservation Act No. 5 of 2009. In the Consolidated Criminal Applications No. 109, 114, 115, 117, 119 and 120 the appellant was refused bail under section 36 (4) of the Economic and Organized Crime Control Act, [Cap 200 RE 2002] on the ground that the offence for which bail was being sought was committed while the appellant was out on bail in another case. That is Criminal Case No. 209 of 2011. The appellant was charged with receiving stolen property under the Penal Code.

The case was heard and the appellant was acquitted. It was after the acquittal in that case that the appellant went to the High Court again and made the application which was refused by Teemba, J. The learned judge was of the considered opinion that the appellant's previous

application having been refused, it was a final decision and the court was "*functus officio*".

The appellant was aggrieved by the decision of the High Court. He filed two grounds of appeal faulting the decision of the High Court. The grounds are:-

1. That the learned Honourable judge grossly misdirected herself in fact and in law in holding that the appellant could not file a fresh application for bail pending trial given the fact that Criminal Case No. 209 of 2011 which was the basis of denial of bail in respect of the appellant in the consolidated Application Nos. 109, 114, 115, 119 and 120 of 2012 had been determined in favour of the appellant.
2. That, having regard to the circumstances of the case, the learned honourable judge grossly misdirected herself in refusing to entertaining the application pending trial.

When the appeal came for hearing, the appellant was represented by Mr. Richard Kalumuna Rweyongeza, learned advocate, assisted by Mr. Mark Antony, learned advocate. The respondent Republic was represented

by Ms Lilian Itemba and Mr. Faraja Nchimbi learned Principal State Attorneys. In support of the appeal, the learned advocate said that the learned judge erred in holding that the court was "*functus officio*" and could not entertain the bail application because the reason why bail was refused in Consolidated Criminal Applications No. 109, 114, 115, 117, 119 and 120 was because the appellant had a pending criminal case No. 209 of 2011 which was said to have been committed while the appellant was on a bail in Economic Case No. 8 of 2012. The learned advocate said since the case ended in his favour, he was entitled to be granted bail. He prayed that the appeal be allowed and the appellant be granted bail.

The learned State Attorneys opposed the application bail application because it was refused under section 36(4)(c) of the Economic and Crime Control Act, [CAP 200 R. E. 2002]. They said once the appellant was refused bail, he could not file another application because the decision refusing bail was conclusive. The learned State Attorneys were of the opinion that what the appellant could do was to make an application for a review under section 37 of the Cap. 200 and section 150 of the Criminal Procedure Act, [CAP 20 R.E.2002]. They prayed that the appeal be dismissed.

In brief rejoinder the learned advocate for the appellant submitted that section 37 of Cap. 200 and section 150 of the Cap 20 does not apply to this case because the sections are applicable to public prosecutors. He reiterated his submission that where there is absurdity the judge must make the law by a purposive approach. He did not see the rationale of keeping the appellant in custody while others charged with him for the same offence are out on bail. He emphasized that since the case that made the Hon. Judge Mruke to refuse the bail application that was previously made had been determined, the appellant was entitled to bail as a matter of right. He said the principle of "*functus officio*" is not applicable under the circumstances. Regarding the suggestion made by the learned State Attorneys that the appellant could have asked for a review, the learned advocate replied that there was no error in the decision that was made by Mruke, J. and therefore the appellant could not go for a review. He would not have any grounds for asking for a review. He prayed that the appeal be allowed and the appellant be granted bail.

In this appeal, the issue is simple. Was the learned judge right in finding that the court was "*functus officio*" in determining the bail

application that was filed by the appellant? The answer is definitely **NO**. Why? Section 36(1) of Cap. 200 is clear. It empowers the Court (meaning the High Court sitting as an Economic Crimes Court pursuant to section 3) to grant bail to an accused person. The section reads:-

> *"After a person is charged but before he is convicted by the Court,* ***the Court may on its own motion or upon an application made by the accused person, subject to the following provision of this section, admit the accused person to bail."***

The ruling of Mruke, J. while refusing bail application for the appellant held that:-

> ***"This court cannot go outside section 36(4)(c) of them Economic and Organized Crime Act Cap. 200. My hands are tied up by section 36(4) (c).*** *I totally agree that Mr. Rweyongeza has done a lot in his submission not only for his client the 1st applicant, but to the rest of the*

applicants. However, he has not overridden the wording of section 36 (4) (c) of the Economic and Organized Crime Act Cap 200 R.E. 2002. ***In short, application for bail by the 1st accuded person Hassan Othman Hassan @ Hassanoo is*** hereby ***refused.***"

The appellant was refused bail because he was out on bail in Criminal Case No. 209 of 2011. In the said case the appellant was charged with others for conspiracy to commit an offence and stealing. In alternative they were charged with receiving stolen property. While he was out on bail he committed the economic crime case. Section 36(4) (c) under which bail was refused reads:-

"*the accused person is charged with an economic offence alleged to have been committed while he was released on bail by a court of law*"

The issue which arises is what justification would the court have in refusing to grant the appellant bail after being acquitted in the case which granted him bail before the commission of the economic crime case?

Rational thinking will come out with an answer that the court will have no justification. Guided by the principle that an accused person is presumed innocent until proved guilty and the purpose of granting bail to an accused person is to let him enjoy his freedom so long as he does not default appearances in court when so required until his rights are determined in the criminal case, the High Court erred in not determining the application for bail. The Court was not functus officio. Section 36(1) of Act 200 is clear. Bail can be granted by the Court on its own motion or upon an application by the accused person. He was entitled to be heard on his application. The hands of Mruke, J, were tied by Criminal Case No. 209 of 2011. By the time Teemba J. heard the application, Criminal Case No. 209 of 2011 that tied the hands of Mruke, J. had been determined. There is nothing or record which shows that another hurdle had arisen to make the Court refuse to grant the appellant bail. We agree with the learned advocates for the appellant that sections 37 of Cap. 200 and section 150 of Cap 20 are not applicable to the circumstances of the bail application that was made by the appellant.

With the observation made above, we hold that the learned judge erred in holding that the Court was "*functus officio*" in entertaining the bail

application by the appellant. The appellant having been acquitted in the case that formed the ground for refusing him bail, there was no reason for not considering his bail application. We allow the appeal and remit the file back to the High Court for consideration of the bail application for the appellant.

DATED at **DAR ES SALAAM** this 25th day of January, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL