

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

**CRIMINAL APPLICATION NO. 09/06 OF 2020
(Arising from Criminal Appeal No. 453 of 2019)**

**AMON MULOTWA MWALUPINDI APPLICANT
VERSUS**

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

**[Application for bail pending appeal to the Court from the decision
of the High Court of Tanzania at Mbeya]**

(Utamwa, J)

**dated the 21st day of October, 2019
in**

Criminal Sessions Case No. 123 of 2019

RULING OF THE COURT

12th February & 31st March, 2021

KOROSSO, J.A.:

This is an application for bail pending appeal. Amon Mwalupindi, the applicant, is serving a sentence of five (5) years imprisonment following conviction by the High Court of Tanzania sitting at Mbeya in an offence of attempted murder. Aggrieved, the applicant instituted an appeal to this Court in Criminal Appeal No. 453 of 2019. That appeal is awaiting hearing and determination by the Court.

The application has been lodged by way of Notice of Motion pursuant to Rule 11(2) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) supported by an affidavit sworn by the applicant himself. The

applicant has annexed to the affidavit copies of several documents that is; notice of appeal to this Court, the impugned judgment, the charge sheet and medical chits from Mbeya Zonal Referral Hospital. The application is premised on three grounds set out in the notice of motion and amplified in paragraphs 6, 7, 8, 9 and 10 of the affidavit namely; ill health, old age and attendant complications and need to appear and defend his case against him before the District Court of Rungwe in Criminal Case No. 78 of 2018.

The respondent filed an affidavit in reply sworn by Ms. Prosista Paul, learned State Attorney rebutting most of the averments contained in the affidavit.

At the hearing of the application, the applicant was represented by Mr. Moses Ambindwile, learned counsel while Ms. Prosista Paul and Ms. Zena James, both learned State Attorneys entered appearance for the respondent.

Mr. Ambindwile began his submissions by adopting the contents of the Notice of Motion and the supporting affidavit and urged the Court to find and hold that the grounds and reasons set out therein are sufficient to enable the Court exercise its discretion granting bail pending appeal. The learned advocate contended that the applicant has complied with rule

11(2) of the Rules which gives wide discretion to the Court to release him on bail pending determination of his appeal.

In elaboration, the learned counsel argued that the reasons supporting the application include the fact that the applicant is of ill health, elderly and has a physical disability which accounts for his need for constant medical attention. He also argued that the respondent will not be prejudiced if the applicant is granted bail pending appeal as sought because he will be available to attend the hearing of the appeal and to receive the consequences thereon. The counsel stressed the fact that the applicant is not informed on the date the appeal will be heard and finally determined which in effect is what prompted the filing of the current application. He thus prayed for the Court to consider the reasons advanced and then proceed to grant bail pending appeal to the applicant as sought.

Resisting the application, Ms. Paul adopted the averments in the affidavit in reply and submitted that none of the reasons in support of the application are sufficient to grant bail to the appellant pending appeal. She argued that there were no supporting documents filed to support any of the averments on ill health or old age.

The learned counsel asserted that the medical chits annexed to the affidavit were inadequate since they did not reveal anything related to the

reasons advanced for the grant of the application. They only show that the applicant was attended to at Mbeya Zonal Referral Hospital without more. She also queried the absence of an affidavit from any Prison Officer to explain the state of applicant's health and age complications as averred in the supporting affidavit.

The learned State Attorney discounted the claims that the applicant was of advanced age and argued that this was a flimsy reason because the old age of a convict cannot be taken as an exceptional reason for the grant of bail pending appeal. Had it been so Ms. Paul argued, that was prone to allowing chaos in the criminal justice system. To reinforce her argument, she cited the case of **Lawrence Mateso vs Republic** [1996] T.L.R. 118, where the High Court held that bail pending appeal may be granted not as a matter of right but subject to proving that there are exceptional circumstances and overwhelming chance for the appeal to succeed.

The learned State Attorney also submitted that taking into account the averments from the applicant, it is difficult to see any exceptional circumstances advanced by the applicant to warrant consideration by this Court. She stressed that on the basis of the above cited decision, granting of bail pending appeal is not a matter of right but where the Court considers an application for bail, it is the applicant's duty to prove that

there are exceptional and unusual circumstances to warrant the Court to exercise its discretion in his favour. She invited the Court to dismiss the application for lack of merit.

In his brief rejoinder, the learned counsel for the applicant reiterated his submission in chief and emphasized that the applicant has shown exceptional circumstances in support of the prayer sought. He argued that at any rate, the case cited, that is; **Lawrence Mateso vs Republic** (supra) was a High Court decision which is not binding on the Court. He argued further that apart from the need for the applicant to show exceptional and unusual reason in the cited case, it must be shown that the appeal has an overwhelming chance of success. However, the learned advocate contended that the latter requirement is no longer a correct position of the law because its discussion at this stage is potentially prejudicial to the determination of the appeal.

As stated earlier, this application is brought under Rule 11 (2) (a) of the Rules. We think there was an error in citing the said provision since there is no para (a) in Rule 11. There is only sub rule (2). However, we think the error is minor not going to the root of the application. We shall proceed to determine the merits of the application. We find it convenient to reproduce Rule 11 (2) which reads as follows: -

"11(2) – Section to the provisions of sub rule (1), the institution of an appeal, shall not operate to suspend any sentence but the Court may in any criminal proceedings, where notice of appeal has been given in accordance with rule 68, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."

The above Rule clearly provides that the Court may grant bail pending appeal, but this can be done only where a notice of appeal has been lodged. On the face of it, the Rule appears to be predicating the exercise of the Court's discretion only upon the lodging of a notice of appeal. Luckily, case law provides some guidance from which we can draw inspiration. Apparently, our research has not landed into any decision of this Court on the same. That means we shall be drawing inspiration elsewhere including the High Court on akin situations.

We shall start with a decision of the High Court of Kenya in the case of **Chimambhai vs Republic** (No. 2) [1971] E.A 343 at 345 whereby it was stated: -

"The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, mainly presumption of innocence, but nevertheless the law of today frankly

recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive..."

In Mellan Mareere vs Uganda [2018] UGCA 31 the Court of Appeal of Uganda held that: -

"A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial which is the presumption of innocence."

Many years earlier on, the High Court of Tanganyika then in **Raghar Singh Lamba vs Republic** [1958] 1 EA 337 at page 338 had stated:

"Where a person is awaiting trial, the onus of proving his guilt is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of case, which would clearly offend against the principle."

That decision was cited by the High Court of Tanzania in **Lawrence Mateso v. Republic** (supra) in which the principles for the grant of bail pending appeal were summarised thus:

“(i) That bail is a right applicable only to cases where the accused person has not yet been convicted;

(ii) Bail pending an appeal can be granted only where there are exceptional and unusual reasons or where there is an overwhelming probability that the appeal would succeed;

(iii) Where an argument on the facts needs detailed references to the text of the evidence or the judgment to support it, it cannot be said that the appeal has overwhelming chances of success;

(iv) Since no general principle exists that a person released on bail pending appeal will not be sent back to prison if his appeal fails, the court is reluctant to order that a convicted person be released on bail pending the outcome of the appeal;

(v) Deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice.”

Finally, the Court of Appeal of Kenya in **Jivraj Shah vs Republic**

[1986] eKLR stated: -

“... The principal consideration is if there exist exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the

interest of justice to grant bail. If it appears prima facie from the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have served by the time the appeal is heard, conditions for granting bail will exist.”

We have deliberately brought to the fore the above cited decisions to stress the point that considerations for the grant of bail pending appeal are quite different from those applicable to bail pending trial. In applications for the grant of bail pending trial, courts are guided by one fundamental principle that is to say; right to presumption of innocence whereas in the former, the applicant who is a convict no longer enjoys that right. From the foregoing, it is safe to state that in considering whether or not bail should be granted pending appeal, the courts are guided by the following principles:

- 1. The onus is on the applicant, to satisfy the Court that justice will not be jeopardised by being granted bail pending appeal.*
- 2. In deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice.*
- 3. The applicant must show existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.*

4. If it appears prima facie from the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued.

We shall subject the above principles to the instant application and see whether the applicant has met them considering that the applicant lodged a notice of appeal as a condition precedent to moving the Court to exercise its discretion under rule 11(2) of the Rules.

Firstly, whilst old age and ill health have been taken to be relevant factors in some cases, the applicant has not substantiated his claims. As rightly submitted by the learned State Attorney, old age or ill health alone without any evidence to show how these will impact on the applicant's continued incarceration as a prisoner awaiting determination of his appeal cannot be a good ground for exercising the Court's discretion under rule 11(2) of the Rules. Put it differently, the applicant has not laid before us any material showing that his old age and ill health are such unusual and exceptional circumstances warranting the grant of bail pending appeal. For ease of reference, paras 6 and 7 of the affidavit aver.

"6. That, while waiting for hearing of his appeal on a date which is absolutely not known, the applicant's health is not well at all henceforth deteriorating rapidly the fact that triggered him to seek mercy of the court to admit him on bail.

7. That, the applicant is also very aged viz more than 73 years old now the fact that caused him to experience untold trouble and suffering in the cell that is causing even his legs to swell sometimes."

The medical chits from Mbeya Zonal Referral Hospital supporting the illness show that the applicant has erythrocyte sedimentation which is rated provisional. The other one shows that the applicant has Rheumatoid factor with non-reactive status. They also show that the applicant has uric acid. All the medical chits indicate that the applicant was examined on 17th January, 2020 and the reports were collected on the 20th February, 2020. Suffice to state that if any of the said diagnoses was serious, one would have expected a more recent medical report showing the applicant's current medical status. Without a valid and current medical report to support the applicant's averments or an affidavit from the Prison Officers showing deterioration or otherwise of the health of the applicant, and that the situation cannot be best handled while the applicant is in prison, we are reluctant to endorse the argument that ill health constitutes an exceptional or unusual circumstance to warrant the exercise of our discretion to grant bail pending appeal in the instant case.

With regard to the age of the applicant, there is hardly any proof of the age other than the medical chits reflecting that the applicant's age is

73 years old. Be it as it may, we are not prepared to consider the age shown as constituting exceptional or unusual circumstance to warrant the exercise of the Court's discretion to grant bail pending appeal.

Next, we shall dispose the applicant's contention in relation to attending to a Criminal Case against him before the District Court of Rungwe. With respect, we have failed to place this contention to any of the principles applicable in applications for bail pending appeal. There is nothing before us to show that such attendance is an exceptional or unusual circumstance meriting the exercise of the Court's discretion under rule 11(2) of the Rules. That contention is thus rejected.

Finally, on whether, *prima facie* the applicant's appeal has any prospects of success. Incidentally, Mr. Ambindwile refrained from addressing the Court on this aspect lest it prejudices the merits of the appeal. We agree with him guided by decided cases including; **The Registered Trustees of Kanisa Pentekoste Mbeya vs Lamson Sikazwe And 4 Others**, Civil Application No. 191/06 of 2019 (unreported) and **Tanzania Posts & Telecommunication Corporation vs M/S H. S. Henritta Supplies** T.L.R. 141. In the latter case, the Court stated: -

"It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view

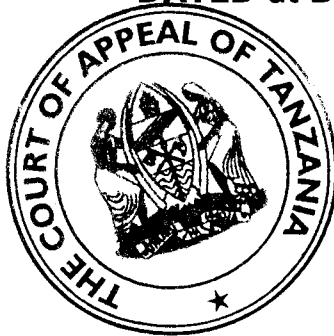
that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides.”

Although that decision emanated from an application for stay of execution pending appeal, the principle is equally applicable to this application. Under the circumstances we cannot consider it as rightly submitted by Mr. Ambindwile.

For the foregoing, it is clear that the application has not met the threshold for us to exercise our discretion to grant bail pending appeal. The application is without merit and we accordingly dismiss it.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of March, 2021.




S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 31st day of March, 2021 in the presence of applicant in person through video conferencing linked to the Court from High Court of Mbeya and Mr. Abel Kihaka, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL