

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

**MISC. CRIMINAL APPLICATION NO. 22 OF 2008
C/F**

CRIMINAL APPEAL NO. 66 OF 2008

(Originating from Criminal Case No. 1164 of 2007 at Kisutu RM's Court)

SIMON DUNIA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

R U L I N G

Shangwa, J.

This is an application for bail pending the hearing of Appeal No. 66 of 2008 filed by the Applicant in this court against the decision of the Court of the Resident Magistrate at Kisutu in Criminal Case No. 1164 of 2007 wherein the Applicant was convicted of the offence of Criminal Trespass c/s 299 (a) of the Penal Code [Cap. 16 R.E. 2002] and the offence of Malicious Damage to property c/s 326 (1) of the

Penal Code. These two offences were framed against him as first and second counts respectively. On the first count, he was sentenced to three months imprisonment, and on the second count, he was sentenced to five years imprisonment. I wish to observe here that the order for sentence does not show whether the sentences which were imposed on the two counts have to run consecutively or concurrently.

The Applicant Simon Dunia has brought this application under S. 368 (1) of the Criminal Procedure Act, 1985 and supported it by affidavit sworn by him before the Commissioner for Oaths on 2nd May 2008. He is being represented by Prof. Leonard P. Shaidi who filed it on his behalf on 15/4/2008 under a Certificate of Urgency.

The major grounds upon which this application is based are contained at paragraphs 4 and 6 of the Applicant's

affidavit. Paragraph 4 of the affidavit reads inter – alia as follows and I quote:-

". . . . that from the proceedings and judgment of the case it is apparent that the learned Resident Magistrate conducted the proceedings in a biased and irregular manner and infringed on my rights to bail, legal representation and refused to withdraw from hearing the case when I strongly and clearly raised my objection to be tried by him on grounds of manifest bias".

Prof. Leonard Shaidi submitted and argued in details on the grounds in support of this application as contained in paragraphs 4 and 6 of the Applicant's affidavit. The learned State Attorney for the Respondent Mr. Solomon Mihayo opposed this application in his reply submissions by saying

inter – alia that from the trial court’s record, it does not appear that the Applicant was denied his right to bail or legal representation by the trial Magistrate. He submitted that the trial Magistrate refused to disqualify himself from dealing with the Applicant’s case because the Applicant did not give any sufficient reason for him to disqualify himself. Furthermore, Mr. Solomon Mihayo submitted that there is sufficient evidence on record upon which the trial Magistrate convicted the Applicant, and that the Applicant’s appeal has no overwhelming chances of success.

In addition to that, Mr. Solomon Mihayo submitted that there are no exceptional and unusual reasons that have been given by the Applicant for his application for bail pending appeal. On this point, he cited the case of **Radhibir Sign Lamb Vs. R.** 1958 E.A. 337.

For me, I have just decided to look at only one ground out of several other grounds upon which this application is

based, and which I think is quite sufficient to dispose of this application. This ground is whether or not the trial Magistrate did accord the Applicant his legal right to be represented by an Advocate in Criminal Case No. 1164 of 2007 filed against him in the Court of the Resident Magistrate at Kisutu.

I have gone through the trial court's record and I have found that the Applicant was not fully accorded his right to be represented by an Advocate. Hearing of his criminal case started on 27/8/2007 and the prosecution called two witnesses who testified against him. These are P.W. 1 Abasi s/o Athuman and P.W.2 Shabani Abdallah Chamote. The trial court's record clearly shows that on that particular date hearing took place in the absence of the Applicant's Advocate Mr. Tuha Mwasey whose name was just recorded in the coram as if he was present in court on that date. The Applicant was only accorded his right to be represented by

an Advocate in subsequent proceedings which took place between 19th September 2007 and 15th April 2008 when he was represented by Mr. Mwakajinga Advocate.

Legally speaking, an accused person's right to legal representation is provided for under S. 310 of the Criminal Procedure Act [Cap. 20 R.E. 2002]. In this case, the Applicant was not given opportunity by the trial Magistrate to enjoy his full right under the said section to be represented by an Advocate right from the date of hearing his case to the date of judgment. This means therefore that his right to legal representation was partly infringed. I agree with Prof. Leonard Shaidi that *"the infringement on legal representation does not have to be for the entire hearing and that even if it is for one session it can still occasion a miscarriage of justice"*.

In my opinion, I think that the trial Magistrate's failure to accord fully the Applicant his right to legal representation

is of an exceptional and unusual kind that may render the validity of the entire proceedings in the relevant case to be entirely questionable. For the reason that I have stated in my Ruling, I hereby release the Applicant on bail pending the hearing of his appeal. I do release him under S. 368 (1) (a) (i) of the Criminal Procedure Act, 1985. No sureties are required by him in so far as this Ruling is concerned. It is so ordered.


A. Shangwa

JUDGE

7/5/2008

Delivered in open court this 7th day of May, 2008 in the presence of Prof. Leonard Shaidi for the Applicant and Mr. Solomon Mihayo for the Respondent.

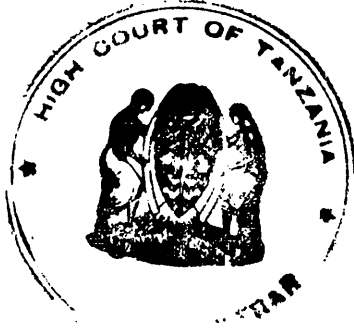



A. Shangwa

JUDGE

7/5/2008

Court: The Applicant resides at house on Plot No. 711
i.e. House No. B 3 at Kawe Beach Kinondoni District.



A. Shangwa
A. Shangwa

JUDGE

7/5/2008