

THE HIGH COURT OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPLICATION NO. 3 OF 2020

(Arising from (DC) Criminal Appeal No. 4 of 2020

of the High Court of Tanzania at Tanga)

ABDI JUMA CHUMA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

MKASIMONGWA, J.

The Applicant Abdi Juma Chuma stood before Tanga District Court charged with Causing Grievous Harm contrary to Section 225 of the Penal Code [Cap 16 R.E 2002]. He was convicted of the offence and sentenced to five years imprisonment. Having being aggrieved with the conviction as well as the imposed sentence, he has preferred appeal to this Court against both conviction and sentence. Pending hearing and determination of the Appeal (Criminal Appeal No. 4 of 2020) the Applicant came up with application for bail. The Application is made by way of Chamber Summons filed under Section 368 (1) (a) (i) of the Criminal Procedure Act [Cap 20 R.E 2002] and supported by Affidavit sworn by Fatuna Yusuf Kika.

The Application is contested by the Respondent, Republic. To that effect, the later filed a Counter Affidavit sworn by Ms. Maisara Mkumbo, the learned State Attorney.

When the Application came for hearing, Ms. Noelina Bippa (Advocate) and Ms. Kayuni (S/A) appeared in Court representing the Applicant and Respondent, respectively. In her submission, Ms. Noelina referred the Court to the decision in the case of **Laurencio Mateso vs. R** (1996) TLR 118 in which the Court provided for what should be considered by the court in an application for bail pending appeal as being: **One:** Exceptional and unusual reasons and **Two:** The overwhelming chances for the Appeal to succeed. Under Paragraph 4 of the Affidavit filed in support of the Application the Deponent averred that the Applicant is the only bread earner for his family which include a pregnant wife, a son and a sick daughter. The daughter suffers from epilepsy semiology and that from financial constraints she could not attend a clinic on 29th December, 2019 as it ought to be. Ms. Noelina submitted that this constitutes exceptional and unusual reason which warrant for grant of the Application for bail pending appeal.

As to the overwhelming chances for the appeal to succeed test, Ms. Noelina submitted that, the raised grounds of appeal, clearly show that the Applicant did give testimony in defence which the court did not consider when composing the judgment. Secondly, that the Applicant was convicted on the contradicting prosecution testimony. Thirdly; that there were several procedural irregularities in the proceedings contested.

Last is whether or not the principles of justice will be jeopardized if the Applicant is released out on bail, and Ms. Noelina submitted that principles of justice will not be jeopardized if the

Applicant is released out on bail pending appeal. She therefore prayed the court that it grants this application for bail pending hearing and determination of Appeal.

On the other hand, Ms. Kayuni, Learned State Attorney, again referred the court to the case of Laurence Mateso (Supra) which provides for the tests to be considered by the court in determining an Application for bail pending appeal. She submitted that, in the case at hand the Applicant has not passed the tests. As to the exceptional and unusual reasons, Ms. Kayuni submitted that, although she is sympathizing with the Applicant for the sickness of his child; sickness of the child as it is in this case, does not constitute the exceptional and unusual reason. This is because it has not been evidenced that the Applicant is the only person in the family who is not maimed. The fact that there are other persons who are free and capable of maintaining the child does not support the contention advanced by the Applicant. Ms. Kayuni added that there is ample evidence that even the Applicant's wife is alive so the sick child in safe hands of the mother.

As to the second test Ms. Kayuni submitted that an application for bail pending appeal is grantable where it is shown that there are overwhelming chances for the appeal to succeed. Going by the evidence adduced before the trial court the same proved beyond doubt the offence with which the Applicant was charged which fact justified the decision of the court. As such the chances for the appeal to succeed are minimal. This is evidenced by the fact that in his defence in the case before the trial court the

Applicant admitted to have assaulted the complainant/victim from the reasons, Ms. Kayuni contended that, which were not justified in law.

Last is whether justice will be jeopardized if the bail is granted in which case Ms. Kayuni submitted that since there are no chances for the appeal to succeed, the victim (complaint) will be of sense that justice has not been done if the applicant is released out bail, hence injure the principles of justice. Based on the above submissions Ms. Kayuni, prayed the court that it dismisses this application.

In a short rejoinder, Ms. Noelina submitted that, it depends on the nature of sickness on which the application for bail pending appeal is made, is based. The sick child under discussion is suffering from mental associated with sickness. The sick child cannot do anything on her own and she only depends, on the grandmother, pregnant mother, two young brothers one of whom is schooling. In that premise, the mother cannot leave the child alone and the Applicant turns to be the only person to earn for the family and in particular cause the sick to be treated. Ms. Noelina reiterated the prayer to have the Application be granted.

I have considered the submissions. As shown herein above, the Applicant applies for an order releasing him out on bail pending hearing and determination of Appeal. This Application is brought under section 368(1) (i) of the Criminal Procedure Act [Cap 20 R.E 2002]. The section reads as follows.

“368 (1) After the entering of an appeal by a person entitled to appeal, the High Court or subordinate court convicted or sentenced such person may, for reasonable cause to be recorded by it in writing.

(a) In the case of a person sentenced to a term of imprisonment order.

(i) That such person be released on bail with or without sureties pending the hearing of the appeal.”

When confronted by an application for bail pending appeal, this court (Samatta, JK as he then was) stated as follows among others:

“The principles which this court applies in determining application for bail pending appeal are I think well established now. They include the following:-

1. ...

2. Bail pending the hearing of an appeal can be granted only if there are exceptional and unusual reasons or where an overwhelming probability that the appeal in question would succeeded exists,

3. ...

4. ...

5. ...

6. ...”

Going by the Affidavit in support of the Application, under paragraph 2 of the same the applicant averred that, he is

dissatisfied by the decision of the trial court hence filed appeal against it. I have considered the averment in the affidavit along with the submission made in favour of the Applicant. It is clear to the court that what is said to be exceptional and unusual reasons are the facts that attracted for a lenient sentence. It is clear to the court that going by Paragraph 4 of the Affidavit these facts existed even during trial of the matter. As such if they were advanced as sentence mitigating factors, may be, were considered by the court, and shall be considered in the appeal. If they were not so advanced, then the allegation at this stage is an afterthought which may not constitute the fact to be considered in the Appeal. This approach of the matter leads me to the fifth principle in the case of Mateso (Supra) that:

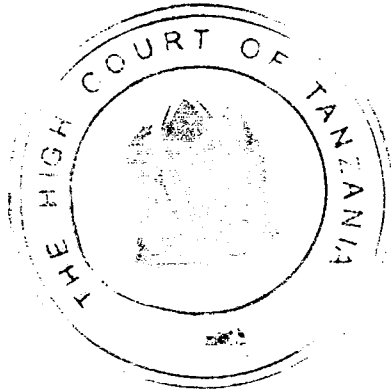
“The execution of the task of deciding whether a person who has been convicted should be granted bail involves balancing the consideration of the liberty of the individual and proper administration of justice”.

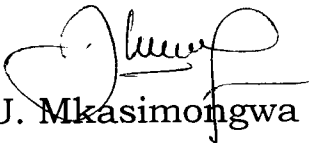
Although, it is necessary that the individual constitutional right to liberty is preserved in favour of the Applicant, the fact that the grounds of this application fits more for consideration in the Appeal, leads the Court to a thinking that, it won't be a proper administration of justice if they are considered at this stage of the case.

In the Light of what is discussed herein above, I decline granting this application. The same is therefore dismissed. Justice

however demands that the Applicant's appeal be expeditiously determined.

Dated at Tanga this 4th of May, 2020.




E. J. Mkasimongwa

JUDGE

04/05/2020