

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO.191 OF 2020**

**ALLY BURUANI MACHO.....APPLICANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**Date of last order:**16<sup>th</sup> October, 2020

**Date of Ruling:** 16<sup>th</sup> October, 2020

**RULING**

**MLYAMBINA, J.**

The application before the Court is for bail pending trial and final determination of Criminal Appeal No. of 2020 before this Court. The application is made under *Section 368(1) (a) and (b) of Criminal Procedure Act, Cap. 20 R. E. 2019* and it is supported with the affidavit of Counsel Fredrick Joseph Ododa. Paragraph 2 through paragraph 10 of the supporting affidavit read:

*2. That the Applicant was the accused person in criminal case number 119 of 2013 at the Resident Magistrate Court of Dar es Salaam at Kisutu where the Applicant was accused of forgery contrary to section 333, 335(a) and 338 of the Penal Code Cap. 16 R.E 2002 and uttering false documents contrary*

- to section 342 of the Penal Code Cap. 16 R.E. 2002. A copy of the charge sheet is Annexed herein as **Annexure ABM-1** which leave is craved to read together as part of this affidavit.*
- 3. That on 21<sup>st</sup> day of September, 2020 Honourable R.W Chaungu – PRM delivered his judgment and convicted the Applicant to the effect that it was ordered for the Applicant be imprisoned for four years. Copy of the judgment is annexed herein as **Annexure ABM-2** which leave is craved to read together as part of this affidavit.*
  - 4. That, the Honourable trial Magistrate erred in law and in fact by failing to consider the fact that the Applicant was an administrator of the estate of his daughter SAADA ALLY BARUANI and therefore not a party to the offences charged despite the strong evidence adduced by the defense witnesses in the trial Court as a result reaching to unreasonable decision to convict the Applicant.*
  - 5. That, the Honourable trial Magistrate also erred in law and in fact in improperly evaluating the evidence on record thereby reaching to unreasonable conclusion to convicts the Applicant.*
  - 6. That, the learned trial Magistrate misdirected herself both in law and in fact by reaching to a finding basing on the weak prosecution evidence and ignore strong defense case that*

- raised enough reasonable doubt to acquit the Applicant but instead he proceeds and convicted the Applicant.*
- 7. That, the Honourable trial Magistrate erred in law and in fact in entertaining the matters of land which he had no jurisdiction as a result he ended up to order on the ownership of land which he had no jurisdiction and reached to unjustified conviction.*
  - 8. That, being aggrieved by the judgment and decree of Resident Magistrate Court of Dar es Salaam at Kisutu the available remedy to the Applicant was to file for an appeal to the High Court of Tanzania against the whole judgment and decree for the interest of justice.*
  - 9. That, due to the circumstances of the case the appeal filed in the High Court of Tanzania have greater chances of success and acquit the Applicant from conviction.*
  - 10. That, the Applicant is an old man of the age of 80's having a big family which depend on him and at his age he suffers health problems and in case the prayers sought in the Chamber Summons are not granted he will suffer greater health, mental and bodily harm. Copies of various medical reports are annexed herein as **Annexure ABM-3***

*collectively* which leave is crave to read together as part of this affidavit.

The Applicant was represented by Counsel Jerome Msemwa and Fredrick Joseph Ododa. The Respondent neither filed counter affidavit nor appeared to support or resist the application despite of proper service and being aware of the hearing date.

When the matter came for hearing on 16<sup>th</sup> October, 2010, Senior Counsel Jerome Msemwa told the Court *inter alia* that the Applicant was charged of forgery and uttering false documents, the offences said to be done on 17<sup>th</sup> July, 1991 and he was convicted on 21<sup>st</sup> September, 2020 for four years jail.

It was perplexed by Counsel Jerome Msemwa that the Applicant was appointed as an Administrator of the estate of the late Saada Ally Baruani in 2008. The disputed property belongs to the deceased. Thus, the Documents (if any) came by virtue of being the administrator of the estate.

Counsel Msemwa told the Court that the appeal has great chances of success on a very narrow ground that the Complainant who is PW1 Sheila Haidary Kavila submitted a Letter of Offer which is exhibit "P1". The exhibit has a last word Haidary K. Kavila. Exhibit "P2" is the copy of the same Offer which is in the Lands Office

tendered by PW2. It reads Haidary N. Kavipa. There are two documents which were tendered in Court. The Applicant is said to have presented to the Ministry of Lands a Letter of Offer with title Haidary N. Kavila.

Counsel Msemwa was of submission that there is no any evidence as to which the exhibit "P1 and P2" were presented by the Applicant at the Ministry of Land. There is no evidence to show that the Applicant presented the alleged forged document either by dispatch or any form. It was alluded by Counsel Msemwa that, at page13 of the impugned decision, it shows the Applicant is 84 years by the time he was convicted. He is sick and he is the first offender and the offence is bailable. He therefore prayed the application be granted pending determination of Appeal No. 235 of 2020.

In consideration of the respective reasons provided and cited provisions of the law, I find the Applicant deserves bail for the following reasons. **One**, the offence of which the Applicant is being convicted is bailable under the law. **Two**, the Applicant is an old person reliably, as per page 13 of the impugned judgement, of 84 years old. **Three**, the Respondent has not resisted the application anyhow. The fact which means that the Respondent has no good ground to object the application. **Four**, unreasonable denial of bail would violate the provisions of *Article 15 (2) (a) of the Constitution*

*of the United Republic of Tanzania* as expounded by the Court of Appeal of Tanzania in the case of **Director of Public Prosecutions v. Daudi Pete** (1993) TLR 22. **Five**, bail should not be refused lightly. This Court in the case of **Sultan Ally Yusuph v. Republic**, Criminal Application No. 230 of 2019 cited with approval the decision in the case of **Abdallah Nassoro v Republic** in which it was held:

*Whether the granting of the application will be detrimental to interest of justice and good order...But such detriment must satisfactorily substantiated by solid reason and not based on vague fears or apprehension or suspicions. And bail should not be lightly refused.*

**Six**, *Section 368 of the Criminal Procedure Act (supra)* of which the application is made, allows grant of bail pending determination of appeal. *Section 368* provides:

*(1) After the entering of an appeal by a person entitled to appeal, the High Court or the subordinate Court which 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 his appeal; or*
  - (ii) that the execution of the sentence appealed against be suspended pending the hearing of his appeal in which case he shall be treated as a remand Prisoner pending the hearing of his appeal; and*
- (b) in any other case, order that the execution of the sentence or order appealed against be suspended pending the hearing of his appeal.*

**Seven**, there is allegation that the Applicant is sick. Though not proved, the old age of the Applicant predicates that he is prone to sickness. In the case of **Amin Mohamed v. Republic**, Criminal Appeal No. 170 of 2004 High Court of Tanzania Dar es Salaam Registry (unreported), my brother Hon. Judge Shangwa (*as he then was*) had these observations:

*The issue is whether his illness constitutes a sufficient cause to grant him bail pending appeal. For me I think it does. His health problems namely hypertension, headache and diabetes with which he is affected cannot be controlled when one is living in poor Prison conditions as those at Keko Prison from where he is serving his sentence. The said Prison is crowded*

*with Prisoners. The majority of them are very noisy. Those who are serving long sentences are in a state of despair and are quite troublesome in their daily life. The Prison food services are notoriously poor. Mostly, the Prisoners are fed on porridge, ugali, beans and broth. Patients with diabetes and hypertension such as the Applicant are advised by medical doctors not to take sugared and salty foods...*

**Eight**, there is no any denial that the Applicant is the first offender. As such, the Applicant cannot be denied bail for no good reason.


There is the question of chances of success. As observed by my brethren Shangwa in **Amin Mohamed case** (*supra*), likely of success is an old test which has greatest disadvantage of attracting premature comments by the Court on the merits of the appeal and it calls for pre judgement in the pending appeal, an act of which I cannot dare. (Further, see the case of **Director of Public Prosecutions v. Michael Mukalula and Alex Kujuna Ruta**, Criminal Appeal Case No. 259 of 2018 High Court of Tanzania, Dar es Salaam Registry).

In the light of the above observation, this Court grants bail upon fulfillment of the following conditions:



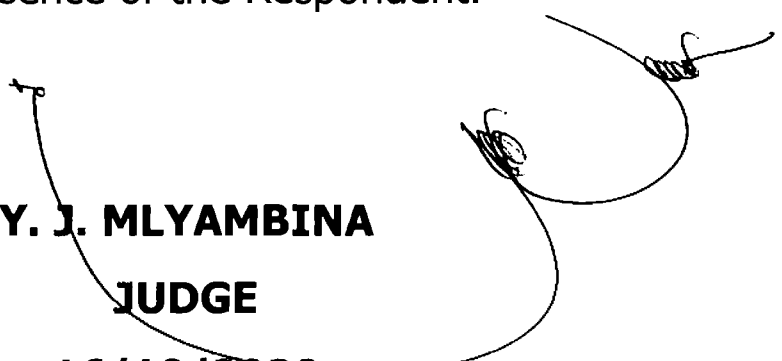
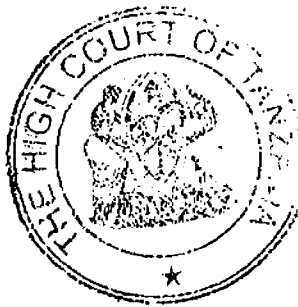
1. The Applicant has to execute a bail bond to the tune of Tshs. 5,000,000/=.
2. The Applicant shall have two credible sureties with fixed abode within Tanzania.
3. Each of the two sureties shall execute separately a bail bond in a sum of Tshs. 5,000,000/=one of the sureties shall either be a Government employee or a person employed in a recognized Public entity. The other surety must produce proof of immovable property within the jurisdiction of this Court.
4. The Applicant should not leave Dare es Salaam Region without prior permission of the Deputy Registrar of this Court.
5. The Applicant must attend in Court on every date his appeal is scheduled unless prevented by reasonable cause.
6. The Deputy Registrar of this Court has to approve the sureties and bail documents before the Applicant is released on bail.

Order Accordingly.



**Y. J. MLYAMBINA**  
**JUDGE**  
**16/10/2020**

Ruling delivered and dated 16<sup>th</sup> October, 2020 in the presence of Counsel Jerome Msemwa and Fredrick Joseph Ododa for the Applicant and in the absence of the Respondent.



**Y. J. MLYAMBINA**  
**JUDGE**  
**16/10/2020**