

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 30 OF 2020**

(From The Resident Magistrate's Court of Songwe at Vwawa PI NO. 18/2019)

HAMZA HUSSEIN MPONGOLELA.....1ST APPELLANT
BONIFACE MWAKABANJE @ WILLIAM
MWAKABANJE.....2ND APPELLANT
ISAKWISA THOBIA LUPEMBE.....3RD APPELLANT
ELIA ANOSISYE MWAKAJWANGA.....4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the last order: 09/03/2020

Date of Judgment: 23/03/2020

NDUNGURU, J.

This appeal by the appellants Hamza s/o Hussein Mpongolela, Boniface Mwakabanje s/o William Mwakabanje, Isakwisa s/o Thobias Lupembe and Elias s/o Anosisye Mwakajwanga who are charged in the Resident Magistrate's Court of Songwe with the offence of Attempt to murder contrary to Section 211 (a) of the Penal Code, Cap 16 of the Laws (Revised Edition 2002).

The appellants were denied bail and remanded into custody by the virtue of Section 148 (5) (d) of the Criminal Procedure Act, 1985 Cap 20 (Revised Edition 2002) on the basis that the appellants be kept in custody for their own protection or safety. Being aggrieved by the ruling dated 27/01/2020 which denied them bail, the appellants have preferred this appeal. The grounds of appeal set in their memorandum of appeal are as follows:

- (1) That the learned Senior Resident Magistrate grossly erred in law and in fact by denying the grant of bail to the appellants on ground that the offence committed is a result of political feud between the accused person (CHADEMA PARTY) and the victim (CCM PARTY) while the same was not proved and the application for bail was at the very initial stage (committal proceedings).
- (2) That the learned Resident Magistrate erred in law and in fact by being biased and including his political sentiments into the criminal case hence denial of bail to the appellants.
- (3) That, the Honourable learned Senior Resident Magistrate erred in law and fact by failure to properly consider and analyze the submissions made by the counsel for the appellants and that of

the Prosecution (The Republic) hence wrongly exercised the judicial discretion which led to the denial of bail.

Before me when the appeal was scheduled for hearing Ms. Rose Kayumbo, assisted by Ms. Jenipher Silomba and Mr. God Mgimba learned counsel represented the appellants while Ms. Zena James, the learned State Attorney appeared for the respondent/the Republic. I am grateful for all of them.

In her submission before me on the first ground of appeal, Ms. Rose Kayumbo learned counsel argued to the effect that, the appellants are charged with an offence of Attempt to Murder contrary to Section 211 (a) of the Penal Code, Cap 16. The offence is bailable one and that the appellants are presumed to be innocent till when the court provides otherwise she referred this court to Article 13 (b) of the Constitution of United Republic of Tanzania, 1977 as amended time to time. She thus submitted that it was improper for the trial Magistrate to deny the appellants bail on the ground that the offence arose from the political feud or antagonism, because what is before the Resident Magistrate is an inquiry/committal proceedings no evidence has been tendered to establish the guiltiness of the appellants. The counsel referred to this court the case of **Freeman Arkael Mbowe & Another vs. Republic**, Criminal Appeal No. 344 of 2018 (High Court) (Unreported).

Ms. Rose Kayumbo further submitted to the effect that the offence the appellants are facing is bailable, the charge does not demonstrate that the offence is resulted from Political feud nor does it reflect the Political status of neither the appellants nor the victim. Thus the Resident Magistrate erred in denying the appellants bail on the reason that the offence was committed as a result of Political feud.

On the second ground the counsel's argument is that from the record it is clear that the Resident Magistrate invoked his political sentiments by concentrating much on discussing the political differences prevailing at Songwe particularly Tunduma township thus forgetting the role of hearing the application before him thus ending in denying the appellants bail as shown at page 5 of the typed ruling.

The counsel submitted further that the Resident Magistrate wrongly exercised his judicial discretion to deny the appellants bail on the fact that from the wording contained at page 5 the last but one paragraph, the Resident Magistrate had already entered conviction to the appellants basing on his own political sentiments.

The counsel prayed the appeal be allowed, the ruling of the Resident Magistrate of Songwe be quashed and this court be pleased to grant bail to the appellants and set bail conditions to the appellants.

Responding to the grounds of appeals, Ms. Zena James, the learned State Attorney, argued the 1st and 2nd ground together to the effect that, the Resident Magistrate rightly denied the appellants bail, political ideology was not the criteria the Magistrate based on denying the appellants bail as asserted by the counsel for the appellants. That the Resident Magistrate considered Section 148 (5) (d) of the Criminal Procedure Act and found it reasonable to restrain the appellants in custody for their own safety. That was based on the submission made by prosecution during hearing of the application that there was a threat of attacking the applicants. Basing on that fact the court considered if the appellants are not kept in custody their safety could be at jeopardy.

The learned State Attorney submitted further that, though it is believed that the offence rooted from the political grudges but the appellants denial of bail was not based on political hostility but the resident Magistrate took into consideration the safety of the appellants. She said **Mbowe's** case cited by the counsel of the appellant is not binding at all.

On the 3rd ground the learned State Attorney argument was to the effect that the Resident Magistrate considered the submissions of the parties made analysis and came to the findings that for safety of the appellants let bail be denied thus it cannot be said that by denying the

appellants bail the Magistrate did not exercise his discretion judiciously, he did. She thus prayed the appeal be dismissed.

In rejoinder, though all three counsel for the appellants submitted but basically they reiterated what was their submission in chief.

Having gone so far through the record at hand, grounds of the appeal filed and the oral submission made during the hearing by both sides, I must admit that this is one of the most interesting appeal I had come across.

From the outset, I am of the firm view that though it is said that bail is the constitutional right of the accused but, powers to determine are bestowed to the court. The court has the discretion to grant or refuse it, but that is only to those offences bailable. Such discretion must be exercised with the highest degree of caution and judiciously. As a judicial process the court must be guided with law applicable and facts placed before it.

Whether the offence is bailable or not is the point of law, there are some offences which the law is very specific that they are not bailable. In the instant case, I am at one with the Resident Magistrate that the jurisdiction of the Resident Magistrates' court on entertaining bail application was not at issue because the offence is bailable.

The record reveals that having fully heard the application, the Resident Magistrate in exercising his discretion as provided under Section 148(5) (d) of the Criminal Procedure Act Cap 20 R.E 2002 which provides;

(d) it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety.

I have no dispute with the above provision used to deny the appellants bail. As already stated above, that the offence at issue being in law bailable; and taking into account the constitutional presumption of innocence, that freedom and liberty of an individual has no substitute and the fact that the primary purpose of remanding the accused person in custody is not to punish him but ensure that he will appear to take his trial and not to seek to evade justice by leaving the jurisdiction of the court **(See Jaffer vs. Republic (1972) HCD 92)**, to my view the denial of bail needs more rational and lucid reasons not casual than what can be taken into.

At this point, the question is whether there were enough and sufficient material facts placed before the court which having analysed and equated to the law made the court to arrive to its findings. From the record at hand, the alleged offence was committed on 22/11/2019, the 1st and 2nd appellant were charged on 26/11/2019 four days after the offence

had been committed and the 3rd and 4th were charged on 15/01/2020. The record is silent as to where the appellants were before they were sent to the court and if there was a threat of attack what prevented them from being attacked as submitted by Ms. Zena James, the learned State Attorney.

But again looking at the wording of the ruling at page five para 2 of the typed ruling the Resident Magistrate states:

"Differences in political ideologies are everywhere in the democratic nation as it is in Tanzania, but when such differences rise to the level of attempting to kill one another, our courts have a role to play even at this bail state, the court should make every effort to do everything at its disposal to prevent the escalation of such acts that may lead to fatal results either to other members of the community of the accused persons if released on bail."

From such wording it is clear that the Resident Magistrate has concentrated more on the political situation prevailing and is convinced that the offence resulted from political antagonism instead of treating the offence as it is. To my view those were mere assumptions because dissimilarity in political ideologies is not a newly emerged phenomenon in our country. It has been there since the adoption of multiparty system. But again from the record neither the prosecutor nor the appellants' counsel submitted as to who belongs to which political party between the accused

persons and the victim. But interestingly, the Resident Magistrate at page 2 second paragraph of the typed ruling has emphatically pointed out as he stated:

*".....nor was there any dispute that the offence itself was a result of political feud between the accused person (CHADEMA PARTY, and the victim (CCM PARTY). **What was in issue was whether this court would grant bail or not under the circumstances**"*

From the above quotation, the issue being the point of controversy to be determined, it cannot be denied that the Resident Magistrate decision was overwhelmed by his personal sentiments and personal facts gathered out of court which have no judicial evidential value which led to the failure to exercise the discretionary powers given judiciously

Being said and done, I allow the appeal by quashing the ruling of the Songwe Resident Magistrate's Court dated 27/01/2020.

For balance of convenience and demand of justice, bail to the appellants is granted under the following conditions:

- (i) The appellants to have two reliable sureties each, each Surety to have introduction letter from the Local Authority of his/her locality.
- (ii) That each surety to submit/produce a copy of the identity Card be it Voters Registration Card or National Identity Card.

- (iii) Each surety to sign a promise bond of 5,000,000/= (Five Million).
- (iv) The appellant not to travel outside Songwe Region without Written permission of the Resident Magistrate In charge of Songwe.

The sureties be approved by the Resident Magistrate to whom PI CASE NO. 18 OF 2019 has been assigned to.

It is so ordered.




D. B. NDUNGURU
JUDGE
23/03/2020

Right of Appeal explained.

Date: 23/03/2020

Coram: D. B. Ndunguru, J

1st Appellant: Present

2nd Appellant: Present

3rd Appellant: Present

4th Appellant: Present

For the Appellants: Ms. Kayumbo assisted by Jenipher Silomba
Advocates

For the Republic: Ms. Zena James – State Attorney

B/C: Zena Paul

Ms. Zena James – State Attorney:


The matter is coming for judgment, we are ready.

Ms. Rose Kayumbo – Advocate:

We are ready for judgment.

Court: Judgment delivered on 23/03/2020 in the presence of Ms. Zena
James State Attorney, Ms. Rose Kayumbo Advocate for the
appellants and the appellants themselves.




D. B. NDUNGURU
JUDGE
23/03/2020