

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

MISC. CRIMINAL APPEAL NO 1 OF 2020

(Arising from Economic Case No. 18 of 2019 from Liwale District Court)

UWENI ABDALALAH MKINGIJAGI1ST APPLICANT

KASIMU OMARY KITICHO.....2ND APPLICANT

MATATA RASHIDI MBIKULAGE.....3RD APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Hearing date on:11/10/2020

Ruling on: 12/2/2020

NGWEMBE, J;

The applicants, Uweni Abdallah Mkingijagi, Kassimu Omary Kitocho and Matata Rashidi Mbikulage are jointly facing an economic case No. 18 of 2019 pending in Liwale District Court. Being charged in court, the Applicants have preferred an application for bail in this court under section 148 (5) (a) (ii) of the Criminal Procedure Act, [Cap 20 R.E 2002], read together with section 29 (4)(d) of Economic and Organized Crime Control

Act [cap.200 R.E 2002] as amended. The application is supported by affidavits of the applicants.

In turn the Director of Public Prosecution through the learned State Attorney Gidion Magesa, filed a counter affidavit in opposition of the application for bail together with one ground of Preliminary Objection. The ground of objection was to the effect that *"the application is incompetent and bad in law for including a document which is not provided under the law"* However, on the hearing date, the learned State Attorney Ms. Makala Eunice, applied in court to abandon the preliminary objection and proceeded with hearing of the main case. The court granted the prayer and proceeded to mark the ground of objection as abandoned.

Briefly, the applicants are charged for two counts, that is Occasioning Loss to a Specified Authority contrary to paragraph 10 (1) (4) of the First Schedule to and section 57(1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E 2002] as amended by Act No.3 of 2016 (EOCCA). The second count is Stealing Contrary to section 265 of the Penal Code [Cap 16 R.E 2002]. It is alleged that on diverse dates between 10th day of October 2017 to March 2018, at Mikunya village within Liwale District in Lindi region, did cause loss of TZS 22,826,250 property of MIKUNYA AMCOS. Thus, all applicants were arrested and arraigned in court charged under Economic offences pending at Liwale District Court.

On the hearing date of this application for bail, the applicants did not procure legal services of learned advocates, thus had no useful arguments

to their application. Rather, prayed for bail so that they may seek court's indulgence to settle the matter. In the adversarial side, the Respondent was represented by Ms. Makala Eunice learned State Attorney, who briefly submitted that the Republic/Respondent does not oppose the application for bail, save that the court when considering appropriate bail conditions, should be in line with the provisions of law and should be capable of compelling the applicants to attend their criminal cases to the end.

It is a settled principle of law that granting or otherwise of a bail is purely a discretionary powers of the court. However, such discretion must always be exercised judicially. More so, according to our statutes, such discretion is limited by statutory conditions provided for under section 29 (4) (d) of EOCCA read as follows:-

"After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purpose of this section the power to hear bail applications and grant bail:

*(d) in all cases where the value of any property involved in the offence charged is **ten million shillings or more** at any stage before commencement of the trial before the court is hereby vested in the **High Court**"*

Similarly, section 148 (5) (e) of CPA provides jurisdiction to this court to grant bail with conditions so provided therein as rightly quoted hereunder:-

"A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if:-

*(e) the offence with which the person is charged involves actual money or property whose **value exceeds ten million shillings** unless that person **deposits cash or other property equivalent to half the amount** or value of actual money or property involved and the rest is secured by execution of a bond*

Provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence as is satisfactory to the court in proof of existence of the property; save that this provision shall not apply in the case of police bail"

In both sections, the amount involved is TZS 10 million or more. The applicants are charged for occasioning loss of TZS 22, 826,250/- property of Mikunya AMCOS. As such, bail conditions should be aligned with the sections cited above. Notably, nowadays, bail conditions are no longer court's discretion, despite the presence of presumption of innocence preserved in Article 13 (6) (b) of the Constitutions of United Republic of Tanzania.

Under normal circumstances, the most celebrated legal principle related to bail was that, *bail conditions do not depend on ability by the accused person to comply with, but they are fixed to ensure that, the accused person appears in court for his/her trial.* As such, bail conditions should be reasonable, affordable and capable of being complied with. This position was pronounced in several cases, including in the case of **Professor Dr. Costa Rick Mahalu and Grace Alfred Martin Vs, Hon. Attorney General, Misc. Civil Cause No. 35 of 2007; Athanas Sebastian Kapunga & 7 others Vs. R Misc. Economic cause No. 7 of 2017 and Meshack Lupakisyo Kapange & another Vs. R. Misc. Criminal Cause No. 8 of 2019.**

The overriding objective of bail conditions are centered on assurance of the applicant/accused to attend court trials, whenever required and to ensure that, while on bail the applicant will not commit other offences of similar nature or breach of peace and tranquility of the society.

In the case of **Fidelis Tindwa Vs. R, [1985] TLR 131**, in considering the application for bail, the court held:-

"From what has been deposed so far, I am certain that accused will appear in court for his trial if he is released on bail. I am farther of the opinion that it is not for interest of justice that should continue to be in incarceration".

Likewise, in the case of **Anasaa Shererengwa Mushi Vs. R, [1984], TLR 170**, the court held:-

"The availability of an accused to stand trial is a major, but not sole, test to be applied in considering whether or not to grant bail, a court considering to grant bail is entitled to take into account all the circumstances pertaining to the case before exercising its discretion one way or another"

Another wisdom on bail was promulgated by **Lord Denning** in **Mc Elraith Vs. Grady, [1968], QB 648** held:-

"No man's liberty is to be taken away unless every requirement of the law has been complied with"

Lastly, Justice Biron in the case of **Patel Vs. R, [1971] HC 391** raised four fundamental questions to be asked by any court faced with an application for bail; namely; **Firstly**, whether the accused would be available at the trial; **Secondly**, whether the accused is likely to commit further offence if he is allowed out on bail in which case his character is certainly not irrelevant; **Thirdly**, whether the accused is likely to interfere with the investigation by influencing witnesses or otherwise; and **Fourthly**, the gravity of the accusation and the severity of the punishment if conviction results.

Those questions are relevant even to date, when bail conditions are considered by a competent court of law, specifically when bail conditions are purely discretionary powers of the court. In the present statutes and as discussed above, bail conditions are no longer discretionary powers of the court, rather statutory.

As rightly discussed hereinabove, bail conditions on Economic Cases are provided for under section 36 (5) & (6). The conditions under subsection (5) are mandatory, the term used is "shall" meaning must be complied with. The court has no discretion to depart from those statutory conditions for bail, but may add as provided for under subsection 6 of the section.

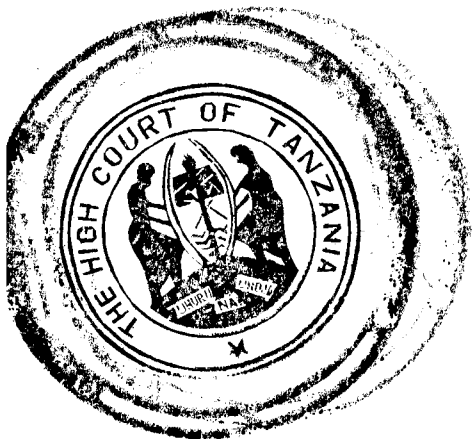
I have no doubt, the accused persons, while on bail will not fault to enter appearance at the trial court, whenever required. Such assurance is born out of paragraph 7 of their affidavits. More so, there is no doubt that when they are on bail won't commit other offences or breach of peace and tranquility in the society.

In the premise, the applicants, **UWENI ABDALLAH MKINGIJAGI; KASSIMU OMARY KITICHO AND MATATA RASHID MBIKULAGE** are hereby admitted to bail as prayed in the Chamber Summons. Being guided by section 36 (5) of Economic and Organized Crimes Control Act, and considering that the value of money in the offence facing the applicants, is TZS 22, 826,250/= the cited section provides mandatory conditions to be followed. Therefore, the grant of bail to the applicants are subject to the fulfilment of the following conditions:-

1. Each applicant shall deposit cash **TZS 3,804,375/=, which is calculated as follows: TZS 22,826,250/= $\sim 2 = 11,413,125/=$ $\sim 3 = 3,804,375/=$** or deposit **Title Deed** of immovable properties having similar value or more value located in Mtwara Municipality or Lindi, or Liwale District or in any other cities in Tanzania;

2. Every applicant must provide two reliable sureties who are to execute bonds valued **TZS. 3. 8 million** each, preferably one surety may be an employee of the Government of United Republic of Tanzania or any reliable company or corporation;
3. Every applicant should not leave the jurisdiction of the District Court of Liwale without permission from the District Magistrate;
4. The applicants should surrender their passports, if any, or any other travelling documents to the District Magistrate of Liwale;
5. The applicants are mandatorily compelled to appear in court at any time when they are required for hearing and final determination of their criminal case facing them; and
6. Verification of the sureties and bond documents shall be executed by the District Magistrate of Liwale.

I accordingly Order.



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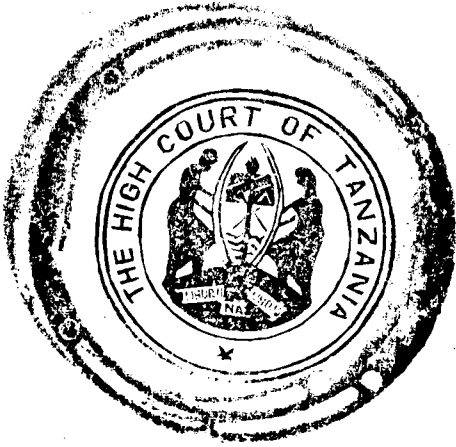
P.J. NGWEMBE

JUDGE

12/02/2020

Court: This Ruling is delivered at Mtwara in Chambers on this 12th day of February, 2020 in the presence of applicants and Ms. Gideon Magesa, State Attorney for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.



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P.J. NGWEMBE

JUDGE

12/02/2020