

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

**MISC.ECONOMIC CRIMES APPLICATION NO. 41 OF 2019**

*(Originating from the District Court of Liwale in Economic Crime Case No. 14 of 2019).*

**RAJABU CHANDE MKENAME..... APPLICANT**

**VERSUS**

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

**RULING**

*Hearing date on: 10/02/2020*

*Ruling date on: 12/02/2020*

**NGWEMBE, J:**

The Applicant Rajabu Chande Mkename is facing an Economic Case No. 14 of 2019 at Liwale District Court. He is alleged to have occasioned loss to a Specified Authority contrary to paragraph 10 (1) & (4) of the first schedule, 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. Another count is stealing contrary to section 265 of the Penal Code. Allegedly on diverse dates between November and December 2018, during the harvesting season of year 2018/19 at Nyera Village within Liwale District in Lindi Region, the applicant being a clerk of Nyera B, did cause loss of TZS 12,540,000/= of Mshikamano AMCOS.

The applicant after being arraigned in court and charged accordingly, has preferred this application for bail in this court under certificate of urgency. The applicant failed to procure services of learned advocate, thus, on the hearing of the application had nothing useful arguments in support of the application for bail. He only relied on sections 29 (4) (d) and 36 (1) of Economic and Organized Crimes Control Act Cap 200 R.E. 2002 as amended by Act No. 3 of 2016, read together with section 392A (2) of Criminal Procedure Act Cap 20 R.E. 2002. More so, he relied on his affidavit in support to the Chamber Summons.

In turn the Respondent was represented by learned State Attorney, Makala Eunice, who did not oppose the application, but asked this court to give conditions of bail as provided for by the enabling provisions of law.

Undoubtedly, this court has discretionary powers to grant or refuse to grant bail. However, such discretion always must be exercised judicially otherwise, failure to do so, may amount into abuse of discretion. Notably, there are two limiting factors of that discretionary powers of this court. First, is the use of that discretion. Second is statutory, whereby, economic cases like this one, bail conditions are provided for under section 36 (5) & (6) of the Economic and Organized Crime Control Act (EOCCA,) and section 148 (5) (e) of Criminal Procedure Act (CPA). These sections statutorily infringe the discretionary powers of this court to determine bail conditions. More so, the statute has limited the jurisdiction of courts to admit and determine applications for bail. Section 29 (4) (d) of EOCCA is quoted 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. Notably, when the Act was enacted about twenty years ago, such sum of money was viewed as quit a lot, deserving the attention of this court. However, such amount of money as of today and with current financial situation of our country, is viewed as small amount deserving an attention of a lower court. Unfortunate that is the law, unless it is amended, otherwise, this court cannot refuse to apply such law.

On the other hand, bail conditions are no longer court's discretion, for same are provided for by the law. Despite the presence of presumption of innocence of an accused person, until proved guilty as preserved in Articles 13 (6) (b) of the Constitution, yet such presumption ought to be accompanied with basic rights to obtain bail on affordable and executable bail conditions. Recently, there is an outcry in the society that there are good number of people incarcerated in prison pending final determination of their criminal charges and the number is increasing daily. Such increase is contributed by stringent statutory bail conditions who only few may afford, thus, contradicting the Constitutional principle of innocence of an accused person until proved guilty.

Under normal circumstances, the most celebrated legal principle related to bail is 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 so strongly 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 in the society.

I am attracted with the wise advice of Judge Biron (as he then was) in the case of **Patel Vs. R, [1971] HC 391** when was confronted with similar application for bail, he came up with four preconditions as I hereby quote:

*"Man whilst awaiting trial is as of right entitled to bail, as there is a presumption of innocence until the contrary is proved. I would say that the court should be guided by four main principles on the granting of bail pending trial; **First** and foremost is that the court should ask itself whether the accused would be available at the trial; **Second** is 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. Three, is whether the accused is likely to interfere with the investigation by influencing witnesses or.*

*otherwise; **Four** the gravity of the accusation and the severity of the punishment if conviction results"*

Those questions are relevant to date, when bail conditions are considered by a competent court of law, bail is purely discretionary powers. In the present statutes and as discussed above, bail conditions are no longer discretionary powers of the court, rather statutory. The present statutes have ousted the jurisdiction of this court to determine bail conditions in accordance with the prevailing circumstances of each case.

As rightly discussed hereinabove, bail conditions on economic cases are provided for under section 36 (5) & (6) of the Act as amended by the Written Laws (Misc. Amendments) Act No 3 of 2016, which amended section 36 (a) by deleting and substituting with new subsections as quoted hereunder:-

Section 36 (5): *"Where the court decides to admit an accused person to bail, it shall impose the following conditions on the bail, namely:-*

*(a) Where 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;*

- (b) Appearance by the accused before the court on a specified date at a specified time and place;*
- (c) Surrender by the accused to the police of his pass port or any other traveling documents; and*
- (d) Restriction of the movement of the accused to the area of the time, village or other area of his residence”.*

36 (6) The court may, in addition to the mandatory conditions prescribed in subsection 5 impose any one or more of the following conditions, namely:-

- (a) Requiring the accused to report at specified intervals to a police station or other authority in his area of residence;*
- (b) Requiring the accused to abstain from visiting a particular locality or premises, or association with certain specified persons;*
- (c) Any other condition which the court may deem fit to impose in addition to the preceding conditions which appear to the court to be likely to result in the appearance of the accused for the trial or resumed trial at the time and place required or as may be necessary in the interest of justice or for prevention of crime.*

These preconditions especially 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 as quoted above.

I have no doubt, the accused person, while on bail will not fail to enter appearance at the trial court, whenever required. Such assurance is born out of paragraph 8 of his affidavit that he has already written a letter to the Director of Public Prosecution asking for pardon and refund of the claimed amount of money. Further, when he is on bail will not attempt to interfere with investigation process or influence witnesses. More so, there is no doubt that when he is on bail will not commit other offences or breach of peace and tranquility in the society.

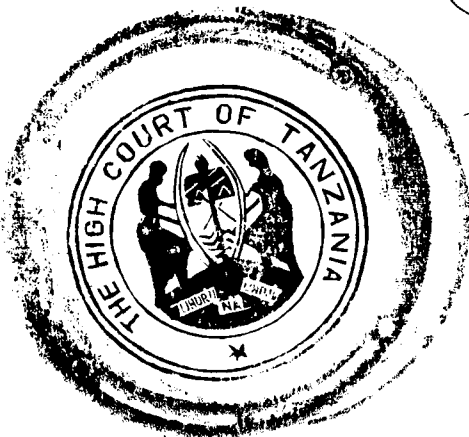
In the premise, the applicant, **RAJABU CHANDE MKENAME** is hereby admitted to bail as prayed in the Chamber Summons. Being guided by the above quoted section 36 (5) of Economic and Organized Crimes Control Act, and considering that the value of money in the offence facing the applicant, is TZS 12,540,000/- slightly above the threshold of statutory amount of ten million shillings. The cited section provide mandatory conditions as quoted above, therefore, the grant of bail to the applicant is subject to the fulfilment of the following conditions:-

1. The applicant shall deposit cash **TZS 6,200,000/=, which is calculated as follows: TZS 12,540,000/= ÷ 2 = 6,270,000/=** 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. The applicant must provide two reliable sureties who are to execute bonds valued **TZS. 3 million** each. Preferably one surety may be an employee of the Government of United Republic of Tanzania or any reliable company;
3. The applicant should not leave the jurisdiction of the District Court of Liwale without permission from the District Magistrate;
4. The applicant should surrender his passport, if he has, and any other travelling documents to the District Magistrate of Liwale;
5. The applicant is mandatorily compelled to appear in court at any time when he is required for hearing and final determination of the criminal case facing him; 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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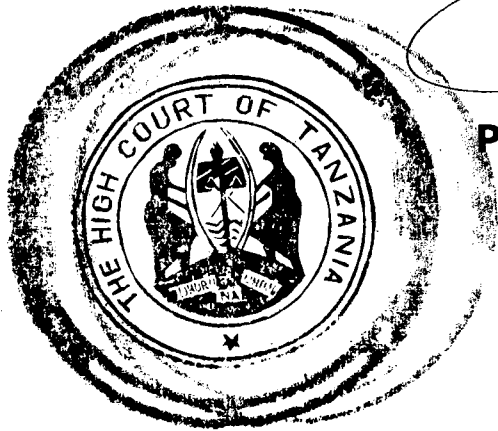
**P.J. NGWEMBE**

**JUDGE**

**12/02/2020**

**Court:** Ruling delivered at Mtwara in Chambers on this 12<sup>th</sup> day of February, 2020 in the presence for the Applicant and Ms. Makala Eunice, 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**