

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
MISC. CRIMINAL APPLICATION NO. 09 OF 2021
(Arising from Criminal Case No. 186/2016)

KULWA NGELELA BUKULA APPLICANT
VERSUS
THE REPUBLIC RESPONDENT

RULING

24/05/2021 & 24/06/2021

W. R. MASHAURI, J;

This is an application for bail pending trial of Criminal Case No. 186 of 2021. It has been filed by the applicant under section 148(I) of the CPC Cap. 20 R.E. 2019.

The applicant Kulwa Ngelela Bukula enjoys the services of Mr. Yuda learned counsel.

When the matter was called in court for hearing on 24/05/2021, the applicant contended in his affidavit as well as he does in his submission that, this is an application for bail filed in this court under Section 148(I) of the

CPA Cp 20 R.E. 2019. That, in his affidavit the applicant has deposed that, he was arrested and charged under Section 211(a) and (b) of the Penal Code Cap. 16 R.E. 2019 and has been in remand custody since 2015.

That he has reliable sureties to stand for his bail. He therefore prayed the court to grant his bail and release him on bail pending trial of his case Criminal No. 186 of 2016 which is still pending in the Registry of the High court of Tanzania at Mwanza.

That, in his counter affidavit Mr. Hemed Senior State attorney has tried to answer the affidavit of the applicant by saying that, there is no written document showing and/or stating why the applicant is under remand custody for the charge of attempted murder. He did not however controvert that, his is charged with the offence of attempted murder the act of which shows that, the republic is conceding the application of the applicant in particular paragraphs 2, 3 and 4 of the affidavit in which the applicant said the offence he is charged with is bailable.

That, failure to controvert the appellant's affidavit amounts to admit all that stated by the applicant in his affidavit. To back up his submission, counsel for the applicant referred this court to the case of **East African Cables (T)**

Ltd v/s Benson Services Ltd. Misc. No. 61 of 2016 Hc. DSM Registry

(unreported) in which the court stated at page 7 of typed judgment that:

"the affidavit or counter-affidavit is evidence given on oath and in filing counter-affidavit the respondent is required to controvert the affidavit of the applicant by saying it either be a lie or otherwise as without which must be taken that the said contentions in the applicant's affidavit is admitted"

To say that the applicant is put into strict proof is not correct as this is not a civil case in which a party may be put into strict proof. On that regard, we submit that, the appellant's affidavit has not been properly controverted in law.

That, as prosecutor the learned Senior State Attorney failed to prove by charge sheet that the offence the applicant is charged is bailable or not.

That this is a five years pending case. He therefore prayed the court to grant the applicant's bail on conditions or whatever the court may deem just to grant.

On his part, Mr. Hemed Senior State attorney who appeared for the Republic/Respondent submitted in reply upon heard the submission by Mr. Yuda counsel for the applicant that, upon being served with the applicant's

affidavit he filed counter-affidavit on 18/05/2021. He prayed the counter affidavit to be adopted by this court and the court adopted it.

That in his counter affidavit he did not say that, the applicant's bail is not bailable as what he said in his counter affidavit is that, under paragraphs 2, 3 and 4 of the applicant's affidavit the applicant did not attach any charge to enable this court to detect that, the applicant is an under custody for the offence of attempted murder. That it is the charge sheet which can make the court to know where the appellant was charged and with what offence. This caused him to say under paragraph 3 of the counter affidavit that he objected the applicant's application for bail because, the applicant had failed to attach the charge sheet which shows the offence he is charged with. The allegation that, he did not reply to paragraphs 2, 3 and 4 of the affidavit is not correct. He answered in paragraph 3 that, the applicant was duty bound to attach a charge sheet showing the offence he is charged with.

That, it is true that the applicant is charged with the offence of attempted murder which is a bailable offence. The applicant must have applied for bail in a subordinate court and failed to meet the conditions imposed on him by the lower court. It is not known if he was given hard conditions and failed to meet them. he could not therefore come to this court

again by way of another application for bail. That if the applicant was given bail by the subordinate court and abused his bail conditions upon which his bail was waved, this application give anxiety as to its reality under S. 148(5) (c) and 148(3) of the CPA Cap. 20 R.E. 2019.

On that regard, this application is not clear and the court should not work on a doubtful application and has therefore nothing to give as stated under paragraph 5 of the counter affidavit.

He therefore prayed the court to dismiss this application for want of clarity.

In rejoinder Mr. Yuda learned counsel for the applicant, said that, in his submission, Mr. Hemed Senior State Attorney has agreed with him that the offence of attempted murder is bailable and that, in law bail to a person charged with a bailable offence is a constitutional right.

That, the allegation that the application is not clear is a mere assertion because if the application is not clear the respondent would have deposed into his counter affidavit on his anxiety that this application is not properly before this court, and that the appellant is not charged with the offence of attempted murder.

That, even under paragraph 5 of the affidavit the applicant has attached a letter showing that his relatives were fighting to bail him but they failed. He therefore prayed the court to grant the applicant's bail application with conditions or not as the court may deem just.

The issue is whether the applicant's failure to attach a charge sheet to his application vitiates the applicant's right to be released on bail.

It is not disputed in this application is that, the offence of attempted murder C/s 211(a) and (b) of the Penal code is bailable. In his submission in support of the application, Mr. Yuda learned Advocate for the applicant has told the court that the applicant is charged with the offence of attempted murder and has been under remand custody since 2015.

That the offence of attempted murder is bailable. On his party Mr. Hemed, Senior State Attorney also said in his submission that, the offence of attempted murder is bailable.

He however controverts on the grant of the applicant's application as the applicant did not attach a charge sheet to his application, the act of which brings an anxiety to his application he has put some reasons to support his allegation of anxiety. Each side is required the other party to

prove the offence of attempted murder, the appellant is required to prove by tendering a charge sheet. The learned counsel for the applicant has even dared to request the court to search a copy of judgment in the office of Hon. Rumanyika, Ji/c. in which the main case file is before him pending trial in so far as the matter has been committed by the District court to the High court for trial the request of which is contrary to the procedure as the court is not party to the case. The requirement by the parties to the case to search for the judgment is therefore reciprocal.

On my side I venture to say that the requirement by the parties to search the copy of judgment in the office of the Hon. Ji/c is a small contempt of court, the request is disregarded. The requirement is a mere technically and contrary to the overriding objective principle which require the court to deal with cases justly and to have substantive justice.

Having so said, this application for bail filed by the applicant is granted on the following conditions: -

1. He shall be released on bail on executing bond in the tune of Shs. 1,000,000/= with two sureties each in the like sum.

2. Sureties to produce in court introductory letters from their respective village leaders affixed with their pictures.
3. Accused to report to the OCD Geita Police Station once a week pending trial and determination of the case.
4. Sureties to be approved by the presiding magistrate of the case.




W. R. MASHAURI

JUDGE

24/06/2021

Date: 24/06/2021

Coram: Hon. W. R. Mashauri, J

Applicant:

Respondent:

B/c: Elizabeth Kayamba

Miss Ajuaye, Senior State Attorney: I appear for the respondent. We are ready for ruling.

Court: Ruling delivered in court in presence of Miss Ajuaye, Senior State Attorney for the Republic and in absence of the applicant with this 24/06/2021, applicant to be informed of the outcome.




W. R. MASHAURI

JUDGE

24/06/2021