

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

MISC. CRIMINAL APPLICATION NO. 26 OF 2020

(Original Criminal Case No. 10 of 2019 of the District Court of
Tabora at Tabora before: Hon. J. Rushwela, RM)

LUZIGA S/O ALLY @ JUMA APPLICANT

VERSUS

REPUBLIC RESPONDENT

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RULING

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Date of the Last Order: 3/9/2021

Date of Delivery: 1/10/2021

AMOUR S. KHAMIS, J.

Luziga Ally Juma stand arraigned in the District Court of Tabora for attempted armed robbery and grievous harm. He was convicted and sentenced to fifteen (15) years in prison by the District Court of Tabora on 21/06/2018.

The applicant filed an application for bail before this Court the same was registered as Miscellaneous Criminal Application No. 26 of 2020. This is the Applicant's bail application pending the



determination of the Applicant's Criminal Appeal No. 10 of 2019 which is before this Court.

The application was brought by chamber summons under section 368 (1) (a) (i) of the Criminal Procedure Act, Cap. 20 R.E. 2019 and section 32 (1) (a) and (b) (i) (A) of the Magistrates Court Act, Cap. 11 R.E. 2019.

The affidavit of Flavia Francis, advocate of this Court, supported the application.

Ms. Francis deposed that the offences which in the Applicant are convicted against by the Tabora District Court was attempt Armed Robbery and grievous harm and all two offences are bailable offences.

She averred that the applicant was serving the sentence in jail which adversely affects his health as he suffering from chest illness and has overwhelming chances of success in the appeal since the prosecution evidence was very weak.

The learned Counsel averred that it was in the interest of justice that applicant be granted bail pending his appeal as bail is legal right granted by the law.

The Republic filed a Counter Affidavit deposed by one John Mkonyi, State Attorney.

Mr. Mkonyi stated that it is in the interest of justice for this Court not to grant bail for the applicant's Appeal No. 10 of 2019 has already been fixed for hearing and the Applicant's Affidavit has not

contained any commitment towards complying with the bail conditions which would be set upon bail be granted.

When the application was placed before me for hearing Mr. John Mkonyi, Learned State Attorney appeared for the Republic and Ms. Flavia Francis, Learned Advocate, acted for the applicant.

By consent of the Counsel for the Respondent and applicant, the application was argued by way of written submissions.

It is stated in the written submission of the applicant that, the applicant was convicted by Tabora District Court on 21st June, 2018, to serve 15 years in jail for the offence of attempt armed Robbery and grievous harm in Criminal Case No. 53 of 2017.

Ms. Flavia Francis contended that the offence that the applicant was charged of is bailable and that the applicant enjoyed bail throughout trial of his case.

In reply, the Counsel for the respondent submitted that the application for bail pending appeal is granted if there is reasonable cause advanced by the applicant. The mere allegation that the appeal has overwhelming chances of success does not suffice to be regarded as a reasonable cause.

He cited the case of **NKANGA ALPHONCE VS. MARY NKORI** (Misc. Criminal Application No. 30 of 2020) in the High Court of Tanzania at Mwanza whereby the Court emphasized that:

“the issue of overwhelming chances of success requires the Court to determine the grounds of appeal to satisfy

to itself there is an overwhelming chance of success otherwise the same cannot be proved.”

Mr. Mkonyi, contended that it is very rare for bail to be granted pending appeal. He asserted that this court has once drawn a distinction to the effect that there may be chances of the appeal succeeding but not overwhelming chance.

He cited the case of **REPUBLIC VS. NICHOLAS ALFRED KIYABO** (1987) T.L.R. 40 whereby it was held that bail pending appeal will be granted if there are overwhelming chances of success and the record of lower court indicates that the appeal is bound to succeed.

Mr. Mkonyi further argued that the applicant has not pointed out the irregularities and illegalities which will bind the appeal to succeed.

He added that the applicant's allegation that he suffered from chest illness did not constitute a reasonable ground for this Court to grant bail allegedly because the Applicant did not attach any documentary evidence to substantiate his claim.

In this regard, the counsel urged this Court not to accord any weight to the applicant's Application.

Finally, Mr. Mkony submitted that bail pending appeal was not an automatic right compared to bail pending trial, and insisted that bail pending appeal would only be granted if there are overwhelming



chances of success and nothing less. He urged this Court to dismiss the appeal.

There is no dispute that the applicant is in custody and that there is a pending appeal in which he challenges his conviction and sentence.

The issue for determination is whether the applicant's illness constitutes a sufficient cause to grant him bail pending appeal.

This being an application for bail pending appeal, it is governed by Section 368 (1)(a)(i) of the Criminal Procedure Act, Cap 20 RE 2019, which states that:

"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."

This provision has been interpreted in numerous decisions of this Court and the Court of Appeal.

In **LAWRENCE MATEO V REPUBLIC [1996] TLR** p122, which is a land mark authority in this area, it was held that bail pending hearing of an appeal can only be granted if there are exceptional and

unusual reasons or where there is an overwhelming probability that the appeal in question would succeed.

In **RADHIBIR SINGH LAMB V.R (1958) EA 337**, it was held that:

'... the principle to be applied is that bail pending appeal should only be granted for exceptional and unusual reasons..... Neither the complexity of the case nor the good character of the applicant nor the alleged hardship to his dependents justified the grant of bail'.

Bail pending appeal may also be granted on account of sickness which is not treatable in custody (**HASSANALI WALJI V.R (1968) HCD 174**).

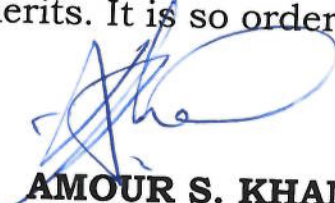
In the instant case, the grounds under which the application is premised are stated in paragraph 5 of the supporting affidavit wherein the applicant deponed that he suffers from chest illness.

Whereas illness would constitute a good ground for grant of bail pending appeal, it must be established that such illness is not treatable in custody. The application will not be entertained if the disease is treatable in custody.

Addressing this issue in **HASSANALI WALJI V.R (1968) HCD 174**, this Court stated that, an application for bail pending appeal should be dismissed if an illness of the applicant is treatable in custody.

In the instant case, whereas it may be true that the applicant is under medication for chest illness, it is equally evident that his disease is treatable in custody with similar competency as it would have been treated if he was not in custody.

For the stated reasons, I go along with the holding in **HASSANALI WALJI V R** (supra) and inevitably dismiss the application for want of merits. It is so ordered.


AMOUR S. KHAMIS

JUDGE

1/10/2021

ORDER:

Ruling delivered in open Court in presence of the appellant and his advocate Ms. Flavia Francis and Mr. Deusdedit Rwegira, learned State Attorney. Right of Appeal explained.




AMOUR S. KHAMIS

JUDGE

1/10/2021