

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPLICATION NO. 226 OF 2021

*(Originating from Criminal Case No. 254 of 2021 before the District Court
of Ilala at Kinyerezi)*

ZARINA MOHAMED SADIKI.....APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

Date of Last Order: 20/10/2021

Date of Judgment: 29/10/2021

MASABO, J.:

Zarina Mohamed Sadiki was convicted by the district Court of Ilala at Kinyerezi for using abusive language and was subsequently sentenced to a prison term of one year. Aggrieved by the conviction and sentence inflicted on her, she filed an appeal, Criminal Appeal No. 200 of 2021, currently pending before this court. Subsequently, she has filed this application praying that she be admitted on bail pending determination of her appeal. The application is accompanied by an affidavit deponed by the applicant in which, apart from narrating the ordeal leading to her conviction, she has assigned the following reasons to her application: old age- she is 51 years old; illness; dependence- she is the only bread winner for her family and, lastly, the appeal has great chances of success.

When the application was called on for hearing the applicant represented by Mr. Martin Frank, learned counsel, submitted that the applicant has been sick prior and after conviction and has been receiving medical treatment from different hospitals. He referred the court to copies of medical reports annexed to the applicant's affidavit and argued that the applicant was diagnosed with Liver Fat grade one disease, she had surgery and as she ages, her condition deteriorates further. Moreover, he argued that, since her admission in prison she has been facing multiple health problems, mainly asthmatic attacks and all she has been receiving from the prison health facility is first aid and excuse from duty. Regarding dependence, it was argued that the applicant is a single mother. She has children who entirely depend on her for living and one of them is sick. On the ground that the appeal has greater chances of success, the applicant's counsel submitted that, the case emanated from a family dispute hence there is a likelihood that the applicant will emerge victorious. Lastly, he argued that bail is a right. Thus, the applicant should be admitted on bail so that she can enjoy her liberty.

For the Republic, Ms. Jacqueline Werema, learned State Attorney, submitted that much as bail is a basic right, only an accused person is entitled to bail as of right. For a person convicted of an offence, bail is not a right. It is only granted where there are special circumstances. In fortification of her point, she cited the case of **Amon Mlotwa Mwalupindi v DPP**, Criminal Appeal No. 9 of 2020, CAT (unreported). With regard to sickness, she replied that, the ground has no merit as the applicant has rendered no evidence in court

to substantiate her averment. The medical report submitted dates back to 2018 hence irrelevant and the medical chits allegedly from Ukonga prison has no stamp or anything showing that they are from the prison's health facility. In the alternative, she argued that, even if these medical chits had a stamp, they would not stand the test as they are merely description of medications. Further, she submitted that, Asthma is not a disease that would warrant the applicant's release as it can be treated in the prison.

This being an application for bail pending appeal, there is only one question for deliberation and determination, namely whether the applicant qualifies for admission on bail. In preface and as correctly argued by the learned State Attorney, bail pending appeal is distinguishable from bail pending trial. Whereas the latter is of a right, bail pending appeal is not granted as of right. It is sparingly granted upon the applicant demonstrating exceptional circumstances. This principle and the rationale behind it are well articulated in **Amon Mulotwa Mwalupindi vs The Director of Public Prosecutions**, (supra). Faced with a similar question and having considered its previous decisions and persuasives authorities, the Court of Appeal held thus:

“...the grant of bail pending appeal are quite different from those applicable to bail pending trial. In applications for the grant of bail pending trial, courts are guided by one fundamental principle that is to say; right to presumption of innocence whereas in the former, the applicant who is a convict no longer enjoys that right. From the foregoing, it is safe to state that in considering whether or not bail should

be granted pending appeal, the courts are guided by the following principles:

1. The onus is on the applicant, to satisfy the Court that justice will not be jeopardised by being granted bail pending appeal.
2. In deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice.
3. The applicant must show existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
4. If it appears prima facie from the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued.

In the instant case, as alluded to earlier, the applicant has assigned three grounds for his application. Starting with the first ground, it is a trite law that, much as illness would constitute a good ground for grant of bail pending appeal, for this ground to stand, it must be established that the illness is not treatable in custody (**Hassanali Walji V.R** (1968) HCD 174). The applicant must render material showing that her ill health is such unusual and exceptional thus warranting the grant of bail pending appeal (**Amon Mlotwa Mwalupindi vs The Director of Public Prosecutions** (supra)).

Thus guided, it took me a quality time to examine the medical reports annexed to the affidavit to ascertain if the illness passes the above test but, I found them lacking in many ways. First, there is a discrepancy between the name of the patient in whose favour the reports were issued and the

name of the applicant herein. The reports are in respect of a patient known by the name of Zarina Mussa whereas the applicant herein is Zarina Mohamed Sadiki. Logically, for this court to act on the reports, the applicant had to unravel the disparity. Interestingly, save for the casual statement by the counsel and the applicant (in the course of hearing) that Zarina Mussa was the applicant's maiden name which she abandoned after divorce, there was nothing on record to substantiate that Zarina Mussa is indeed one and the same person as Zarina Mohamed Sadiki, the applicant herein. For that reason, I am hesitant to act on the reports.

Second, even if it was to be assumed that Zarina Mussa is indeed one and the same as Zarina Mohamed Sadiki, the medical reports would not add any value to the application as appear to be too old. The report shows that on 20/3/2018, the said Zarina Mussa had an abdominoplasty procedure in India. Thus, three years have already lapsed since the said Zaria Mussa had the procedure/surgery. Since there is no evidence of a recent medical report showing that her sickness was not cured or that her health has been deteriorating as alleged, the report does not suffice as a good basis for admission on bail.

Turning to the medical chit allegedly issued by the prison's health facility, I am in total agreement with Ms. Werema that, apart from lack of identity of the prescribing hospital/health facility, the medical chits produced by the applicant in the course of hearing are merely medical prescription save for two chits which show that the applicant suffers from asthma. Assuming that

the applicant suffers from asthma as alleged, would this suffice as an exceptional ground? The answer is certainly in the negative. As stated above, for sickness to be considered as a sufficient ground, it must be established that the said illness is not treatable while one is in custody. Since there is no evidence that asthma cannot be best handled while the applicant is in prison, the bail cannot issue.

As for dependency which is the second ground, it is self-defeated as the trite law as stated in **Radhibir Singh Lamb V.R** (supra) is that, hardship to the applicant's dependents does not justify the grant of bail. Lastly, much as great chances of success of the appeal is among the grounds for consideration, having found the first two reasons devoid of merit, I am hesitant to proceed to determine the application solely based on this ground as that may entail prematurely determining the appeal.

In the upshot, the applicant has failed to demonstrate the special circumstances to warrant her admission on bail pending appeal. For that reason, the application is found without merit and is dismissed, accordingly.

Dated at Dar es Salaam this 29th day of October 2021.

29/10/2021



X

A handwritten signature in black ink, appearing to be "J.L. MASABO", written over a horizontal line.

Signed by: J.L.MASABO

J.L. MASABO

JUDGE