

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

AT DAR ES SALAAM

**MISCELLANEOUS CRIMINAL APPLICATION NO. 170 OF
2021**

**ALLY OMARY MASENI.....
APPLICANT**

VERSUS

REPUBLIC.....

.....RESPONDENT

RULING

Date of last order:

Date of Ruling:

E.I. LALTAIKA J:

Before the District Court of Kinondoni the applicant Ally Omary Maseni was arraigned with Causing Grievous Harm contrary to section 225 of the Penal Code [Cap 16 R.E 2019]. He was convicted of the offence and sentenced to four years imprisonment and a compensation of Tanzanian Shillings One Million to the victim subsequent to completion serving his sentence. Having being aggrieved with the conviction as well as the imposed sentence, he has preferred appeal to this Court against both conviction and sentence. Pending hearing and determination of the Appeal (Criminal Appeal No. 117 of 2021)

The application is made under Section 368 (1) (a) (i) of the Criminal Procedure Act [Cap 20 R.E 2002] and supported by chamber summons and Affidavit sworn by Ally Omary Maseni. The respondent did not file the counter affidavit to contest the application.

When this matter was called for hearing the applicant appeared in person whereas the Ms Christine Joas, senior state attorney appeared for the respondent. In his submission the applicant briefly submitted that he has the family and old parents who depend on him thus he asked this court to set favourable bail considerations and release him on bail pending the hearing of the appeal.

Replying on the applicant's submission Ms. Joas did not have much to submit alternatively she was of the opinion that the appeal can proceed so that the applicant if the lower records have already been forwarded before this court.

I have given due consideration of the brief submissions by the parties herein it is worthy notable that applications for bail pending appeal are governed by section 368 (1) of the Criminal Procedure Act however case laws have established prerequisite conditions for courts to consider when granting bail pending appeal, the celebrated case of **Lawrence Mateso vs Republic (1996) TLR**, the court of appeal in the case of **Amon Mulotwa Mwalupindi vs The Director of Public Prosecution, Criminal Application No.09/06 of 2020 [2021] TZCA 85 (31 March,2021)** www.tanzilii.org laid the said conditions which I am inspired to reproduce them as hereunder,

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.*

I am fortified to apply the above conditions in the instant matter at hand, the applicant in his submission stated that he has a family depending on him as well as old parents however he has not gone further to justify exceptional or unusual circumstances how his continued stay in prison, have impact on him or to his dependant, then bail would be granted to the majority of cases. I am of the considered view that what he stated in his submission required enough proof to substantiate his claims, this view was also observed in the case of **Amon Mlotwa Mwalupindi vs The Director of Public Prosecution, (supra)** the court stated that;

'.....old age or ill health alone without any evidence to show how these will impact on the applicant's continued incarceration as a prisoner awaiting determination of his appeal cannot be a good ground for exercising the Court's discretion under rule 11(2) of the Rules. Put it differently,

the applicant has not laid before us any material showing that his old age and ill health are such unusual and exceptional circumstances warranting the grant of bail pending appeal.....'

With regard to another condition of chances for the appeal to succeed, I refrain from discussing the same on that ground that can be examined upon hearing the arguments from both sides thus I find it inappropriate to discuss it at this stage. Again in **Amon Mulotwa Mwalupindi vs The Director of Public Prosecution, (supra)** the court guided by its decisions of **The Registered Trustees of Kanisa Pentekoste Mbeya vs Lamson Sikazwe & 4 Others, Civil Application No. 191/06 of 2019 (unreported)** and **Tanzania Posts & Telecommunication Corporation vs M/S H. S. Henritta Supplies T.L.R. 141.**

In the latter case, the Court stated: -

"It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides."

I have also had a glance of the applicant's affidavit supporting the application which the applicant stated under paragraph 6 averred bail is constitutional right protected under article 15 of our Constitution as amended from time to time, I absolutely agree with that however I wish to comment on that by making a clear demarcation that, on bail pending trial, bail is a right

applicable only to cases where the accused person has not yet been convicted since presumption of innocence is of paramount consideration whereas in bail pending appeal such right ceases because the person becomes a convict on which he is duty bound to satisfy the court among other conditions as discussed herein there are unusual reasons to grant bail.(See the case of **Chrisantus Mboya vs Republic, Misc.Criminal Application No.109/2017**,[2018] TZHC 2105; (22 January 2018) www.tanzlii.org

From the foregoing reason the applicant has failed to move this court in exercising its discretion to grant bail pending appeal. The application is without merit. I accordingly dismiss it. The interest of justice however demands that the Applicant's appeal be expeditiously determined
It is so ordered.

E.I. LALTAIKA
JUDGE.
..../....2021