

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA

DC CRIMINAL APPEAL NO. 07 OF 2022

*(Originating from Criminal Case No. 02 of 2022 before the Resident Magistrate Court
at Songea)*

SAI MABULA @ GUGA 1ST APPELLANT

SHAFII MOHAMED 2ND APPELLANT

ABDALLAH HASSAN NAKONI 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 23/05/2022

Date of Judgement: 16/06/2022

MLYAMBINA, J.

Sai Mabula @ Guga, Shafii Mohamed @ Mikoma and Abdallah Hassan Nakoni ("the first, second and third Appellants" respectively) along with one person known as Mohamed Nazir Azam were arraigned before Songea Resident Magistrate Court at Songea for two counts, First, buying Minerals outside Mineral and Gem House contrary to *Regulation 6 (1) and (5) of the Mineral and Gem House Regulation, Government Notice No. 418 of 2019*, Second, selling Minerals outside

Mineral and Gem Houses contrary to *Regulation 6 (1) and (5) of the Mineral and Gem House Regulation (supra)*.

On the first day when the Appellants were brought before the Court, after the charge was read the Magistrate set six conditions for bail. Only one accused was able to fulfil the conditions and discharged. The Appellants herein were aggrieved with the second condition hence this appeal, thus;

That, the trial Court was correct to grant bail but erred in law to set conditions which was contrary to the law.

At the date scheduled for the hearing the Appellants were represented by Mr. Edson Mbogoro, the learned advocate while Ms. Tulibake Juntwa, learned Senior State Attorney appeared for the Respondent, The Republic. This appeal was heard orally. The Appellants appeal against the bail condition which wanted the Appellants, each to pay Tshs 17, 000,000/= (Seventeen Million) cash or to deposit his own tittle deed equivalent to that value. The value of the property Tunduru Blue Supphire Gemstone was 137,011,605.63/= (One Hundred Thirty-Seven Million, and Eleven Thousand, Six Hundred and Five and Sixty Three Sents), which was shared equally by the accused persons.

Counsel Mbogoro argued that, they are not disputing the conditions of bail except the second condition which requires each of the Appellant to deposit his own tittle deed in lieu of cash. He prayed the condition to be lessened to the effect that the tittle deed not necessarily be of the accused persons, even of the surety whose value is equivalent to the stated amount.

Apart from the arguments above counsel Mbogoro for the Appellants said that upon reflecting from the record, he noted that the shifting of the file from the trial Magistrate to another Magistrate on 10th February, 2022 without assigning good reason was in conflict with *section 214 of the Criminal Procedure Act [Cap 20 R. E. 2019]*. On the face of it, this caused the proceedings of that date to be a nullity as the Magistrate was not a trial Magistrate. As such, she had no jurisdiction. He prayed the Court to issue a proper order to remedy the situation.

In reply, Ms. Tulibake Juntwa reminded the Court that, the bail condition issued by Hon. Magistrate based on *section 148 (5) (a) of the Criminal Procedure Act (supra)* which states on the conditions to be issued by the Court. The provision requires bail be issued where a person is charged with an offence mentioned in the said section to deposit cash or property of half value of the involved property. The

proviso requires where the property to be deposited is immovable, it shall be sufficient to deposit title deed or such other evidence as it is satisfactory to the Court in proof of existence of the said property. The proviso is not clear if the title deed must be in the name of the accused person or otherwise.

Ms Tulibake, Senior State Attorney submitted further that, reading the whole provision, and the conditions of bail, she finds that, the Magistrate was right for requiring the accused persons to deposit Title Deed in their own names and from that reason she opposed the appeal.

On the issue of the jurisdiction, Ms Tulibake averred that, it is her view *section 214 of the Criminal Procedure Act (supra)* is not applicable in this application on point that bail was issued without jurisdiction by the Court. It was her view that *Section 214 of the Criminal Procedure Act (supra)* concerns with conviction or committal where proceedings are heard partly by one Magistrate and partly by another. *Section 214 (1) of the Criminal Procedure Act (supra)* is not applicable in this case as it deals with committal proceedings and evidences which is partly done by one Magistrate.

Further, it was the view of Ms. Tulibake that since this case was at the stage of reading charges to accused persons and setting bail

condition, what was done by the respective Hon. Magistrate was proper since it was in compliance to *section 32 (1) of the Criminal Procedure Act (supra)* of reading charges within 24 hours. The second condition was legally proper and the Resident Magistrate Court had jurisdiction to grant the bail. She prayed the appeal to be dismissed.

In his rejoinder the Appellants counsel Mr. Mbogoro reiterated that, the condition that the Tittle Deed must be of the accused person is not correct. There is no proof if the money is his, then there is no need of limiting the Tittle Deed to be of the accused person. The object of bail condition is to secure attendance of the accused person. On non-attendance, the republic must be in a position to recover the stolen property, otherwise, it will be to deliberate punish "kumkomoa" the accused person. If the provision of *section 148 (5) (e) of the Criminal Procedure Act (supra)* has ambiguity it must be in the favour of the accused person. He prayed the appeal be allowed.

Right to bail is one among the basic right provided by the Constitution of the United Republic of Tanzania, 1977 as amended times to times. *Article 13 (6) (a) (b) of the Constitution* provides that:

(6) to ensure equality before the law, the state authority shall make procedures which are appropriate

or which take into account the following principle namely;

(a) *when the right and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned;*

(b) no person charged with the criminal offence shall be treated as guilty of the offence until proved guilty of that offence. [Emphasis added]

The above quoted provision of the law was also insisted in the case of **Hassan Othman Hassa @ Hasanoo v. The Republic**, Criminal Appeal No. 193 of 2014, where the Court of Appeal of Tanzania at Dar es Salaam at page 8, insisted on preserving the innocence of the accused waiting for his right to be determined by the Court for a while he has to enjoy his freedom so long as he does not default appearance.

Apart from that, the crimes in which the Appellants are charged with are among crimes which are bailable under the law. *Section 148 of the Criminal Procedure Act (supra)* provides mandatory conditions to be

fulfilled for the accused person to be released on bail. For easy of reference *Section 148 (1) (2) (3) (5) (e) Criminal Procedure Act (supra) provides:*

148.- (1) where any person is arrested or detained without warranty by an officer in charge of a police station or appears or brought before a Court and is prepared at any time while in the custody of that office or at any stage of a proceedings before that Court the officer or the Court may be, may subject to the following provisions of this section, admit that person to bail; save that the officer or the Court, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section.

(2) the amount of bail shall be fixed with due regard to the gravity of other circumstances of the case, but shall not be excessive.

(3) the High Court may, subject to subsection (4) and (5) of this section, in any case direct that any person

be admitted to bail or that the bail required by a subordinate Court or police officer be reduced.

(4) NA

(5) (e) the offence with which the person is charged involved actual money or property whose value exceed ten million shillings unless that person deposit 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 tittle deed, or if the tittle deed is not available such 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 express meaning the law under *subsection 5 (e) of the Criminal Procedure Act (supra)* require that person to deposit a half value of the subject matter and in default the Tittle Deed or any proof of the existence of the said immovable property which its value is equivalent to the amount. The remain half to be executed through a bond. The

provision does mention neither the accused nor surety's title Deed which has to be deposited, what is required is a Title Deed or any other proof of the existence of the said immovable property.

Subsection (2) of the same provision insist that the bail condition *shall not be excessive*. The use of the word *shall* mean the Magistrate who set bail condition(s) shall set condition which are not excessive to the accused taking into consideration the circumstances of the case. From the record, the second bail condition imposed by the Magistrate did not expressly explain whose Title Deed or Proof required to be deposited to prove the existence of the said immovable property. If that was what the Magistrate meant she was supposed to put into writing because record of the Court shows accurately what happened as it was held in the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR527.

Coming to the issue of jurisdiction; whether the Magistrate on duty at the respective date had jurisdiction to set bail condition while she was not the trial Magistrate. There is no any reasons adduced or direction in which she acted upon. The counsel for the Appellants based on the provision of *section 214 (1) of the Criminal Procedure Act (supra)*, averred that the Magistrate who set the bail condition on the respective day had no jurisdiction simply because *section 214 (1) of the Criminal*

Procedure Act (supra) require the successor Magistrate when taking over the proceedings to adduce reasons as to why the predecessor Magistrate failed to proceed with the matter.

I went through the said provision and discovered that, *section 214 (1) of the Criminal Procedure Act (supra)* is applicable only on a situation where the case or committal proceedings were heard partly. As for the case at hand it is neither at hearing nor committal stage. Therefore, the provision cited by the counsel for the Appellant is distinguishable and inapplicable.

Section 32 of the Criminal Procedure Act (supra) requires that, the Accused person to be brought before the Court within 24 hours from the time he was arrested or as soon as practicable. Meaning that the first time an accused is brought to Court the charge has to be read followed with the setting of the bail condition if the crime he/she is charged with isailable and triable with subordinate Court. Therefore, for the purpose of preserving the accused right, what the Trial Court did is justified so as to protect the right of the accused. It would be unreasonable for the trial Court to read the charge and adjourned the case without setting the bail condition(s) simply because the trial Magistrate was not around.

Furthermore, I am convinced with the Appellants counsel opinion. The aim of bail is to secure the accused person attendance or on non-appearance and the Republic to be in a position to recover the stolen property. In the case of **Rajabu Chande Mkename v. The Republic**, Misc. Economic Crimes Application No. 41 of 2019, High Court of Tanzania at Mtwara, where by my brethren Ngwembe, J. has this to say:

Under normal circumstances, the most celebrated legal principle to bail is that, bail condition does 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 condition should be reasonable, affordable and capable of being complied with.

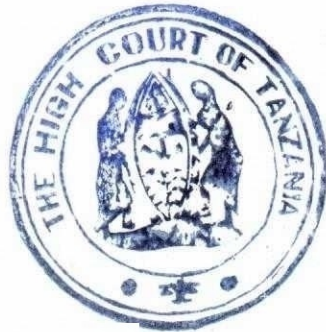
At this juncture, from the record the bail condition set by the Magistrate did not specify whose title deed/ proof of the existence of the property has to be procured, neither the accused persons nor the surety for the accused to be bailed out. As observed by my brethren Ngwembe, J. where he said what has to be taken into consideration is, if the accused person after being bailed out will attend before the trial Court whenever needed. Apart from that, the accused person are

innocent until proved guilty of the charged offence. To deny the Appellants with a bail is like to punish them before being heard.

From the reasons adduced above, the bail condition set by the Magistrate did not expressly require the accused persons to procure the tittle deed in their names only. Even if she did so, the Magistrate was required to afford the Appellants with benefit of doubts because the law is silent. Consequently, to avoid ambiguity, the second bail condition issued by the trial Court is qualified and shall read:

The Accused Persons must deposit half of the value of the amount involved i. e half of TZs 137,011,605.63 which is sharing principle. The same will be divided to four (4) accused persons, thereof. Each Accused Person will be required to deposit TZs (17,000,000/=) Seventeen Million only or deposit a Tittle Deed of immovable property of equal value free of any encumbrances in the Accused Person's names or any Other Surety's name as indicated above and the same must be valuated by the Government Valuer.

In the premises, the appeal is hereby allowed to the extent explained. Order accordingly.

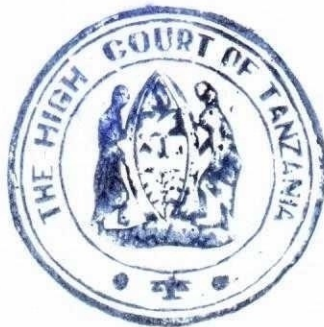


Y. J. MLYAMBINA

JUDGE

16/06/2022

Judgement pronounced and dated this 16th day of June, 2022 in presence of the Senior Learned Counsel Edson Mbogoro for the Appellant and Learned State Attorney Venance Mkonongo for the Respondent. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

16/06/2022