

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

CONSOLIDATED MISC. CRIMINAL APPLICATIONS NOS. 2 AND 3 OF 2022

(Arising from High Court of Tanzania at Kigoma, consolidated (DC) Criminal Appeals No. 34 and 38 of 2021, originating from Criminal Case No. 02/2020 of the Resident Magistrate's Court of Kigoma at Kigoma)

PETER DANIEL MWITA1ST APPLICANT

HILAL CORNEL MUHONDELE2ND APPLICANT

GODFREY ELISALIA.....3RD APPLICANT

PETER PHILIPPO MANDAGO.....4TH APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONSRESPONDENT

RULING

19/5/2022 & 10/6/2022

L.M. MLACHA, J

The applicants, Peter Daniel Mwita, Hilal Cornel Muhondele, Godfrey Elisalia and Peter Philipo Mandago filed an application against the respondent, the Director of Public Prosecution praying for bail pending the hearing of the appeal which they have lodged in the Court of Appeal. The application is made under section 10(a) of the Appellate Jurisdiction Act, Cap 141 R.E

2019 and section 368 (1) (a) (i) and (ii) of the Criminal Procedure Act, Cap 20 R.E. 2019. It is supported by the affidavit of Ignatus Kagashe who is their counsel. Attached to the affidavit is a copy of the judgment of the Resident Magistrates Court of Kigoma made in Criminal Case No. 2 of 2020 (G.E. Mariki PRM), a copy of the judgment of this court made in Consolidated (DC) Criminal Appeals No. 34 & 38 of 2021 (Matuma J) and copies of Notice of appeal for each of them.

The records reveal that Godfrey Elisalia, Peter Philipo Mandago, peter Daniel Mwita, Hilal Cornel Muhondele, Leonard Joseph Kabadu and Majula William Mabingo were charged on three counts. The first count was against Godfrey Elisalia, Peter Philipo Mandago, Peter Danael Mwita and Hilali Cornel Muhondele and it was on Stealing Certain Animals' c/s 258(1) and 268(1) of the Penal Code, Cap 16 R.E. 2019. It was alleged that they stole 62 heads of cattle valued at Tshs. 57,000,000/= the property of Eva Daniel Mtasha. The second count was against Godfrey Elisalia and Peter Philipo Mandago. It was a charge of Armed Robbery c/s 287 A of the Penal Code. It was alleged that they robbed Tshs 3,000,000/= from Ayubu Daniel Mtasha and Philipo Mshingo. The third count was in respect of all of them except Peter Daniel Mwita. It was a charge of Injuring Animals contrary to

section 325 and 35 of the Penal code. It was alleged that they killed willfully and unlawfully 20 heads of cattle property of Eva Daniel Mtasha.

The lower court acquitted them of count one and two. Peter Philipo Mandago, Hilary Cornel Mhondele and Leonard Joseph Kabadi were found guilty on the third count which had a charge of Injuring Animals c/s 325 and 35 of the Penal Code and convicted. They appealed to this court. The respondent Republic was also aggrieved the decision and lodged a cross appeal. The two appeals were consolidated and heard together. In the consolidated appeals, the DPP appeared as the appellant/respondent while Peter Philipo Mandago, Hilary Cornel Mhondele, Leonard Joseph Kabadi, Godfrey Elisalia and Peter Daniel Mwita appeared as respondents/appellants. My brother Matuma J. found Godfrey Eli guilty of Animal stealing contrary to section 268(1) of the Penal Code cap 16 R.E 2019 and sentenced them to 5 years in jail. He also ordered them to pay Tshs 2,760,000/= each to the complainant as compensation. Peter Daniel Mwita, Hilary Cornel Muhondele, Godfrey Elisalia and Peter Philipo Mandago are now seeking bail pending appeal. They have the services of Mr Ignatus Kagashe.

It was the submission of Mr Kagashe that his clients have registered an appeal to the Court of Appeal against the decision of this court. He added that the court have power to release a prisoner pending hearing of the appeal. Counsel argued the court to seek guidance from **Amon Mlatwa Mwalupindi vs. DPP**, Criminal Application No. 96 of 2020 where there are 4 conditions upon which the application can be granted:

1. That, the applicant must show that he is in the process of appeal or there is a pending appeal.
2. That, the appeal will not be jeopardized by the grant of bail.
3. The balance between the liberty of the individual and the proper administration of justice.
4. The existence of unusual circumstances.

Counsel submitted that they have met the first condition through the notice of appeal which is attached. They have a pending appeal in the Court of Appeal, he said. In the second condition counsel submitted that his clients are already convicted and proceedings conducted. The granting of bail will not jeopardize the appeal. On the third point counsel submitted that it is a principle well known that some convictions are erroneous and some punishments excessive. This may be the basis for granting bail pending

appeal which is at the discretion of court. Counsel called the fourth condition a difficult one because the available precedents speak of diseases which is not the case here but hurried to say that the applicants who are civil servants can meet the bail conditions if bail is granted. He added that the granting of bail will not prejudice the Republic because the applicants can still go back to jail if the appeal is decided against them. He said that there are apparent errors in the judgment of this court which if looked upon by the Court of Appeal they can result to the success of the appeal. He gave an example on the way the exhibits were handled. He prayed for the application to be granted.

Mr Clement Masua State Attorney who represented the respondent Republic objected the application. He submitted that saying that the conviction was erroneous or sentence excessive is prejudging the appeal. He said that the offence with which the applicants were convicted have a sentence of 15 years but the court sentenced them to 5 years only. The sentence was not excessive at all. He went on to say that there are no overwhelming chances of success as alleged. He referred the court to **Amini Mahamudu v. Republic** Criminal Appeal No. 170 of 2004 High

Court DSM (Shangwe T Ltd) where it was said that it is not good to invite premature comments on pending appeals.

Mr. Ciement went on to say that there are no exceptional circumstances in this case calling for the grant of bail pending appeal. They have confessed this aspect, he submitted. He argued the court to dismiss the application.

Mr Kagashe made a rejoinder submission and reiterated his earlier position. He argued the court to grant the application.

I have considered the matter carefully. There is no doubt that, in a fit case, the court can grant bail pending appeal to the Court of Appeal. But, this is done subject to the conditions shown above. It is not a free bread to be distributed to prisoners to please them. It is a very delicate area. All the conditions must be met. The first condition talks of the existence of an appeal. This is usually evidenced by a copy of a notice of appeal for the notice of appeal initiates the appeal. The applicants have attached copies of notices of appeal in the affidavit supporting the appeal. My search at the sub registry of the Court of Appeal Kigoma has shown me that there is an appeal registered in the name of the applicants, Criminal Appeal No. 39 of 2022. So there first condition has been met. The second condition is

whether the granting of bail can jeopardize the appeal. This can be measured in many aspects. Counsel cited one aspect saying that the proceedings have already been concluded and judgments delivered so the appeal cannot be jeopardized. I have tried to think about this. I agree with him but I think that there is something more. The court must examine the type of the case and the punishment meted to the applicant and be satisfied that he will not be tempted to escape to avoid the jail sentence. It must examine the possibility of escape and consider the feelings of the society if it happens that the applicant escapes. Even where there is no escape, we must check if the society will not be offended to see the applicant moving around in the street. Counsel did not make any comment in this area. The second condition fails.

The third condition goes to the balance of the liberty of the individual and the proper administration of justice. Counsel for the applicants said that it is known that some convictions are erroneous and some sentence excessive so in a proper system of administration bail pending appeal should be considered. He also said that there is a chance of success of the appeal pointing at the way the exhibits were received. While making comments on the sentence saying that it was not excessive, the state

attorney reminded the court of the need for avoiding premature comments on pending appeals. I have tried to think carefully. I agree that we cannot sit here to discuss the weaknesses of the judgment of this court or try to stipulate the outcome of the appeal. That is not health in a good system of administration of justice. Having considered the balance, I find it that it tilts against the applicants. The third condition is decided against them.

The last point was the existence of exceptional circumstances. Mr Kagashe has admitted that appeal has no exceptional Circumstances within the ambit of existing precedents. He said that all cases which were decided under this heading had sick people. None of his clients is sick. Neither did he point out any other exceptional Circumstances. It means that he agrees that he has failed to meet this condition.

That said, the applications are found to be devoid of merits and dismissed.

It is ordered so.



L.M. MLACHA

JUDGE

10/6/2022

Court: Ruling delivered. Right of appeal explained.




L.M. MLACHA

JUDGE

10/6/2022