

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. CRIMINAL APPLICATION NO. 18 of 2022
(Original Criminal Appeal No. 3 of 2021)

AMANDUS KIMARIO..... APPLICANT
VERSUS
THE REPUBLIC.....RESPONDENT

RULING

01/06/2022 & 13/07/2022

KAMUZORA, J.

This application was brought under the provision of section 368 (1) (a) (i) of the Criminal Procedure Act Cap. 20 R.E 2019. The Applicant is applying for bail pending appeal. The application is made by way of chamber summons and supported by an affidavit sworn by Melchizedek Paul Hekima, the advocate for the Applicant.

Briefly, the Applicant was charged before the Resident Magistrates' Court of Arusha in Criminal Case No.299 of 2020 for the offence of stealing by servant contrary to section 271 and 265 of the Penal Code Cap 16 R.E 2002. After the trial, the trial court found the Applicant guilty, convicted him and sentenced him to serve a custodial sentence of

four years imprisonment and further ordered the Applicant to return a total of Tshs. 26,985,853/= to ASAS Dairies Limited. The applicant was aggrieved and appealed to this court and further filed this application seeking for bail pending determination of the appeal.

When the matter was called for hearing, parties opted to argued the appeal by oral submissions. As a matter of legal representation, the Applicant enjoyed the service of Mr. Melchizedek Paul Hekima, learned Advocate while Ms. Amina Kiango, learned State Attorney appeared for the Republic.

Submitting in support of the application Mr. Hekima argued that, after the Applicant was sentenced to four years imprisonment, he was aggrieved by the said decision hence filed an appeal before this court that is Criminal Appeal No.3 of 2021 and an application for bail pending appeal. The counsel submitted that, in order to apply for bail pending appeal one has to prove that there is a pending appeal and the same has been proved by the notice of appeal as well as the memorandum of appeal showing that there is a pending appeal before Hon. Gwae J. That, section 368(1) (a) (i) of the CPA allows a person to apply for bail pending appeal.

Referring to paragraph 5 and 6 of affidavit in support of the application he stated that, it contains the facts to be considered in the application for bail. That, although the law does not specifically provide for the grounds for bail pending appeal he supported his submission with the case of **Lawrence Mateso Vs Republic**, [1997] TLR 118 where the court in that case considered the grant of bail pending appeal upon proving that there are exceptional circumstances and overwhelming chances of the appeal to succeed.

On the overwhelming chance of the appeal to succeed he submitted that, it is a constitutional right that a part shall be entitled to a fair hearing and have a right to appeal. He cited Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. He insisted that, based on the grounds of appeal lodged by the Applicant, there is claim that, the Applicant was denied the right to be represented after his advocate withdrew himself from the case as seen under page 2 of the trial judgment the act which he argued that it could warrant the faulting of the magistrate's decision, He thus submitted that, the appeal has an overwhelming chance of success.

The counsel for the Applicant argued further that, under the 4th and 5th ground of appeal the Applicant alleged that there was a double

jeopardy as the sentence and order contradicts each other. That, it is a principle that no offence without sentence and no sentence without offence. That, the order which was given is contrary to the offence in the charge sheet hence an overwhelming chance of success.

He added that, the Applicant has a family and has an infant to take care of. That, granting of bail pending appeal will not prejudice the state since in no time the Applicant herein escaped or jumped bail or had previous criminal record. To cement his submission, he cited the case of **Amon Mlotwa Mwalupindi Vs. DPP**, Criminal Application No 9 of 2020 CAT at Mbeya.

Responding to the submission by the counsel for the applicant Ms. Kiango contested the argument that there is an overwhelming chance to succeed. She submitted that, as per section 368 (1) it is clear that an Applicant or a person applying for bail pending appeal will only succeed if such person shows reasonable cause for the grant of bail. That, from the submission made by the Applicant there are no any reasonable cause adduced for the grant of bail pending appeal. Referring paragraph 5 of the Applicant's affidavit she submitted that, nothing much has been given on how the appeal has merit and the Applicant deserves to be

granted bail. In support of her argument, she cited the case of **Amon Muletwa Mwalupindi** (supra).

Regarding the exceptional circumstance she argued that, the Applicant has not shown the exceptional circumstance to be granted bail pending appeal. That, the claim that the Applicant has an infant to take care of is not proved as no evidence has been adduced showing that in the absence of the Applicant the infant cannot be taken care of or who was taking care of that infant for the period he was in jail.

Basing on that submission the counsel for the Respondent is of the view that, it is better to wait for the appeal to be heard so that the court can decide whether the appeal succeed after hearing both parties. That, there is no reason for the bail pending appeal to be granted hence the application be dismissed.

In a brief rejoinder Mr. Hekima submitted that, the case of **Amon Muletwa Mwalupindi** is different from the current case as in the former case the accused was convicted for murder while in the present case the Applicant was convicted for stealing by servant. That if the application will be granted then there is no one who will be prejudiced. On the existence of a special circumstance, he reiterated that, the Applicant was denied a right to be represented and that is unusual

circumstance. That, it is upon the discretion of the court to consider fairly that it is the interest of justice to grant bail hence he prays that the application be granted.

Bail pending appeal is governed by law under section 368 of the Criminal Procedure Act, Cap. 20 R.E. 2019. The specific provision used to move this court to grant bail is section 368(1)(a)(i) which read: -

"368.- (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;"

The above provision allows bail pending appeal upon reasonable cause being shown and recorded by court. The issue for the determination before this court is whether the applicant has shown reasonable cause for granting of bail pending appeal. The principle for reasonable course warranting the grant of bail pending appeal was also well elaborated in the case of **Amon Mlotwa Mwalupindi Vs. The Director of Public Persecutions**, Criminal Application no 09/06 of 2020 CAT at Mbeya (Unreported) pg. 9 where the court held that: -

"From the foregoing, it is safe to state that in considering whether or not bail should be granted pending appeal, the court 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 circumstance that the appeal is likely to be successful on account of some substantial point of law to be argued."*

I have gone through the records of this Application including the parties Affidavits and the submissions from both learned Counsel. I have gathered from the records that there exists a criminal appeal filed before this court and that is Criminal Appeal No. 3 of 2021 which is before Hon. Gwae, J.

Reading paragraph 5 and 6 of the Applicant's affidavit the Applicant seeks the grant of bail for reasons that the appeal has merit and that it is in the interest of justice that the application be granted. Those are the main reasons deposed under the affidavit in support of the application.

In the submission by the counsel for the Applicant it was contended that, the Applicant was denied his right of being heard such that he was denied the right of legal representation after his former advocate withdrew from the conduct of the case. The Applicant also argued that the order given is contrary to the offence in the charge sheet. Those are new facts not deponed in the Applicant's affidavit thus unjustified.

It was contended by the counsel for the Applicant that the offence to which the Applicant was charged and convicted is a bailable offence thus, he be granted bail. It is true that the nature of the offence that the Applicant was charged of is bailable but in the present application this cannot be amongst the grounds for the grant of bail pending appeal since the principle of presumption of innocence does not operate in an application for bail pending appeal. In other words, the reasons that the offence is bailable is only applicable where a person is pending for trial and not pending for appeal. As well held in **Amoni Mulotwa Mwalupimbi** (supra) at page 9, the point for consideration for the grant of bail pending appeal are quite different from those applicable to bail pending trial and the reason that the offence is bailable is not among the reasons which guarantee bail pending appeal.

Regarding the claim that there is a chance of success in the intended appeal the same was also not deposed in the Applicant's affidavit thus an afterthought. What is considered by the counsel for the Applicant as reasons for having chance of success in the intended appeal was not even deposed in the Applicant's affidavit thus an invention by the counsel for the Applicant.

Regarding the claim of existence of an exceptional circumstance that the Applicant has a family and an infant to take care of, I find this claim wanting as well. The same was not prior raised in the Applicant's affidavit and was raised and argued by the counsel for the Applicant in his submission in support of the application. Even if this court decides to consider the said reasons still the claim of one having a family, dependant and or an infant to care of does not warrant the grant of bail pending appeal as the same does not fall under the category of the unusual circumstances as every prisoner/inmate has the same or similar circumstance. Adding to that, it is not only enough for a party seeking for bail pending appeal to only state an exceptional circumstance which faces him or her but the same has to be proved that it really exists. For this see section 110 and 111 of the Evidence Act Cap 6 R.E 2019.

In the final analysis, although I agree that there exists a pending appeal before this court, there is no tangible reason from the Applicant warranting the grant of bail pending appeal. As pointed out above, the alleged exceptional circumstance and the overwhelm chance of success in the intended appeal were unjustified. This Application is therefore devoid of merit and its hereby dismissed.

It is so ordered.

DATED at **ARUSHA** this 13th day of July, 2022




D.C. KAMUZORA

JUDGE