

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. CRIMINAL APPLICATION CASE NO 36 OF 2022

(Arising from Criminal Appeal No 46 of 2022 in the High Court of Musoma at Musoma)

JOHN STEVEN LUBELE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

29th July & 3rd August, 2022

F. H. MAHIMBALI, J.

This is an application for bail pending appeal. John steven Lubele, the applicant, is serving a sentence of four (4) years imprisonment following conviction by Musoma district court in criminal case no. 30 of 2021 which sentenced him to pay back 5300 USD or serve a custodial sentence of four years in jail for each of the three offences convicted with of obtaining money by false pretence contrary to section 301 and 302 of the Penal Code, Cap 16, R.E 2019. Aggrieved, the applicant instituted an appeal to this Court - Criminal Appeal No. 453 of 2019. That appeal is awaiting hearing and determination by the Court.

Now pending the hearing of his appeal, the applicant has knocked the doors of this Court through this application, seeking bail right pending the hearing and determination of his appeal. The application has been lodged by way of Chamber Summons preferred under section 368(1) (i) and (ii) of the CPA, Cap 20 R.E 2019 and is supported by sworn affidavit of Mr. Ostack Mligo, learned counsel for the applicant.

The applicant has annexed to the affidavit copies of several documents that is; notice of appeal to this Court, the impugned judgment, and medical chits from Musoma Zonal Referral Hospital. The application is premised on three grounds set out in paragraphs 5, 6 and 7, of the affidavit namely; ill health (hypertension and hernia complications), poor diet and overwhelming chances of appeal of the applicant.

Whereas during the hearing of the application Mr. Ostack Mligo learned advocate represented the applicant, on the other hand, Mr. Nimrod Byamungu learned state attorney who resisted the application, represented the respondent.

While adopting his sworn affidavit, Mr. Mligo in support of the application submitted that the application is pursuant to section 368 (1),

(i) and (ii) of the CPA, Cap 20 R. E. 2019. He expounded that the applicant as per paragraph 5 and 6 of the affidavit is sick of hypertension and hernia. Currently his health is bad and admitted at Referral Hospital – Mara. The sickness the applicant is suffering from exposes him to a special care and diet, which privileges can hardly be enjoyed or obtained at the prison premises. He added that as per recent developments of the applicant's health, he has already undergone the hernia surgical operation which condition now exposes him to a higher danger which needs special care and treatment suitably available at home basis.

As the offences the applicant has been convicted with are bailable and that the applicant has been faithful and obedient in bail at all the time of pendency of his trial at the District Court, this Court be pleased to consider and grant the application as prayed.

In support of his position, Mr. Mligo made reference the case of **Ally Buruani Macho vs The Republic**, Misc. Criminal Application NO 191 of 2020, High Court at Dar es Salaam District Registry.

In resisting the application, Mr. Byamungu learned state attorney submitted that it is true that as per law, the applicant has a right to bail

pending appeal. However, for the said application to be granted, there must be unusual and exceptional circumstances for the said grant by the Court. He argued that, so long as the presumption of innocence for the appellant has already been rebutted, he is now a prisoner who ought to be treated so. In the circumstances of this case, it is true that the applicant is sick. However, sickness per se is not a sufficient ground for the grant of the said application as there are other sick prisoners in more terminal conditions than the applicant, yet are well accommodated.

That the applicant has been operated is a mere hearsay, as it is neither pleaded nor established. It is a mere submission from the bar. Equally, is the submission that the applicant has been out of bail obediently and faithfully during the pendency of his trial at the subordinate court, it is more the submission from the bar and not from the pleading/evidence.

That the applicant's appeal has greater chances of success, has not been demonstrated. Thus, in the absence of deliberation on this, the application is want of merit.

As per persuading case of **Ally Buruani Macho** supplied by Mr. Mligo, he countered that the circumstances are distinguishable from the current case. In the former case, the Hon. Trial judge considered the issue of old age of the applicant. However, while making reference to the case of **Lawrence Mateso vs Republic** (1996) TLR 118, he submitted that the High Court in that case dealt with five grounds with which the application for bail would succeed. He concluded his submission by urging this Court to consider this application as baseless and that the said right is not open to every convict but only exercisable under very unusual and exceptional circumstances in which the applicant has failed to establish and substantiate.

In his rejoinder submission, Mr. Mligo reiterated his submission in chief. However, he added that as regards to the unusual and exceptional circumstances, there are annexures to the application substantiating the said sickness and surgery operation.

As regards to the great chances of success of the appeal, he submitted that the grounds of appeal are already contained in the appeal no 46 of 2022 pending before this court. The same will be argued during the appeal. He concluded that, as per the said sickness, the applicant needs special care and attention and also needs regular

clinics. On the cited case of **Lawrence** as provided by Mr. Byamungu, he refuted that the case is distinguishable in the current circumstances. He thus humbly prayed the application be granted for the interests of justice.

I have keenly digested the prayers in the application, submission by the parties' counsel and the provided authorities. I am in agreement that this Court is mandated to grant bail pending the determination of the appeal filed in this Court. However, the said right is not absolute. The enabling provision of the said application goes this way, I quote:

*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; or.... **[Emphasis added]***

In my considered view, though bail right pending appeal is legally provided, its grant cannot be equally guaranteed as it has been the case to bail right pending hearing of trial. Whereas the latter right is premised

on the constitutional right of presumption of innocence, in the former situation where one has already been convicted, his legal obligation before the law is punishment which must be executed as per law. Thus, rarely exercised and as submitted by Mr. Byamungu, "*in unusual and unexceptional circumstances*". I entirely agree that bail pending appeal is the discretion of the Court, it must be exercised judiciously taking into account the interests of both the individual and the community. On deciding whether to grant bail or not, the Court must balance the liberty of the individual with the proper administration of justice. In the case of **Lawrence Mateso vs Republic** (supra), the High Court amongst other things listed basic conditions necessary for the granting bail pending appeal:

1. *That bail pending appeal is the discretion of the Court.*
2. *On deciding whether to grant or not, the court must balance the liberty of the individual with proper administration of justice.*
3. *That the applicant **must prove beyond reasonable doubt that justice will not be jeopardized by his liberty** and there are **unusual and exceptional reasons** for granting bail.*
4. *That the appeal has an overwhelming chance of success.*

[Emphasis added]

Though my brother Mlyambina, J in **Ally Buruani Macho** (supra) granted bail pending appeal for grounds of old age, however each case must be determined by its own merits. In that application, it was not even contested and that there existed overwhelming chances of appeal. Nevertheless, my position is, where one's innocence has been rightly rebutted by a court of competent jurisdiction, as a matter of principle, the bail right to a convicted person pursuing his appeal is more privilege than such right previously guaranteed by the Constitution and other instruments of Human Rights. Therefore, It must be exercised with great caution.

The Court of Appeal in the case of **Amon Mulotwa Mwalupimbi V. DPP**, Criminal Application No. 9/6 of 2020, CAT at Mbeya adopted the basic conditions set in the case of **Lawrence Mateso (supra)** in considering the bail pending appeal. While also making a thorough research on such applications, the Court of Appeal of Tanzania made references of decisions of other jurisdictions such as Kenya and Uganda. For example, in the case of **Chimambhai vs Republic** (No. 2) [1971] E.A 343 at 345 the High Court of Kenya did state:

"The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, mainly presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown; the possibility of the conviction being erroneous or the punishment excessive..."

Finally, the Court of Appeal of Kenya in **Jivraj Shah vs Republic**

[1986] eKLR stated: -

"... The principal consideration is if there exist exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have served by the time the appeal is heard, conditions for granting bail will exist".

In **Mellan Mareere vs Uganda** [2018] UGCA 31 the Court of Appeal of Uganda held that: -

"A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial which is the presumption of innocence."

Many years earlier on, the High Court of Tanganyika then in **Raghbar Singh Lamba vs Republic** [1958] 1 EA 337 at page 338 had stated:

"Where a person is awaiting trial, the onus of proving his guilty is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of case, which would clearly offend against the principle."

This decision of Raghbar Singh Lamba (supra) was cited by the High Court of Tanzania in **Lawrence Mateso v. Republic** (supra) in which the principles for the grant of bail pending appeal were considered and adopted.

I have deliberately brought to the fore the above cited decisions to stress the point that considerations for 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, the Court of Tanzania in **Amon Mlotwa Mwalupimbi V. DPP, (supra)** concluded that 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 consideration of the present application, the reasons advanced by the applicant through the affidavit and submissions of his counsel (Mr. Mligo) are mainly sickness of hypertension and hernia. That these diseases expose the applicant into the regular clinics, special diet and homage care. Thus, this application is of utmost important for the interests of justice and rights of the applicant. I beg to differ with Mr. Mligo that sickness perse cannot be the best ground for the grant of the said application. I am aware that in prison, there are more sick cases than this involving inmates yet are well attended by prison facilities including visiting regular clinics, affordable treatment and necessary diet as the case may be. As there has been no proof that such health facilities and food services are hardly available there and that the applicant is in acute shortage, the application can hardly be granted. To put it otherwise, the applicant has not laid before this court any material showing that his ill health is such unusual and exceptional circumstances warranting the grant of bail pending appeal.

By the way, there has been no prove beyond reasonable doubt that justice will not be jeopardized by his liberty and there are unusual and exceptional reasons for granting bail. He has also failed to substantiate how his appeal stands an overwhelming chance of success.

All this said and done, the application is hereby dismissed for want of merit as there is no reasonable cause explained to the satisfaction of the Court to warrant the grant of the application in an usual and exceptional circumstances.

DATED at MUSOMA this 3rd day of August, 2022.




F. H. Mahimbali

JUDGE

Court: Ruling delivered this 3rd day of August, 2022 in the presence of Ms. Maura Tweve, advocate for the applicant, Mr. Nimrod Byamungu, state attorney for the Respondent and Mr. Gidion Mugo, RMA


F. H. Mahimbali

Judge

3/8/2022