

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

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 103 OF 2022

(Originating from High Court Criminal Appeal No. 127 of 2022)

NAJIBU MANSOOR BAJWAHUKA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

15th, & 29th August, 2022

ISMAIL, J.

The applicant is serving a four-year custodial sentence, imposed on him by the Resident Magistrates' Court of Dar es Salaam at Kisutu. It followed his conviction of stealing by servant, contrary to the provisions of sections 258 (1), (2) (a) and 265 of the Penal Code, Cap. 16 R.E. 2019.

Not unexpectedly, the conviction and sentence rattled the applicant, hence his decision to institute an appeal against the trial court's decision. The petition of appeal, registered as Criminal Appeal No. 127 of 2022, a copy of which was supplied by counsel for the applicant, has six grounds of appeal.

In the pendency of the appeal proceedings, the applicant has preferred the instant application for grant of bail pending appeal. The application is supported by an affidavits sworn by Mr. Ferdinand Makore, a duly instructed counsel, and Mwajabu Vaileth Robert of both of which set out grounds on which the application is based.

Ill health and overwhelming chances of success in the pending appeal are main grounds on which the prayer for bail are premised.

Hearing of the application pitted Mr. Ferdinand Makore, learned advocate, whose services were enlisted by the applicant, against Ms. Nura Manja, learned State Attorney, whose usual services were enjoyed by the respondent.

Kicking off the discussion, Mr. Makore began by stating that, in applications for bail pending appeal, the applicant must demonstrate existence of unusual circumstances. He argued that that aspect is taken care of by the paragraph 10 of the affidavit. Learned counsel argued, as well, that the appeal has overwhelming chances on account of several anomalies. These included wrong application of the provision used to convict the applicant; failure to consider the parties' final submissions, an act that is tantamount to denying the applicant the right to be heard. There is also a

contention of variance between the charge sheet and evidence, especially with respect to the name of the complainant.

With respect to illness, the contention is that the applicant is diabetic and under regular medication and visits to hospital. Keeping him in custody, it was argued, would accelerate his death. To support this contention, he referred to several medical reports. The Court's decision in ***Soud Khalfan @ Mtafuni v. Republic***, HC-Misc. Criminal Application No. 17 of 2016 (unreported) was also cited. Mr. Makore firmly contended that the applicant would avail himself whenever he is required to be available. He also committed to abide by the terms of the bail.

Submitting in reply, Ms. Manja began by submitting that in law, bail is the right of the accused and not of the prisoner. She argued that in bail pending appeal, the requirement of the law is that all necessary conditions must be met. These include the fact that there must be a pending appeal with overwhelming chances of success. While acknowledging that the charge sheet cited section 271 of the Penal Code (supra) as the charging provision and the judgment quoted section 265, she was quick to argue that, that alone would not necessarily mean that the appeal is meritorious.

On ill health, the view held by the respondent's counsel is that, whilst it is true that the applicant is subjected to regular medication and attention,

the prison's medical facilities have what it takes to take good care of the applicant. Ms. Manja took the view that the criteria for granting bail had not been cumulatively met, and that the application is not meritorious. She urged the Court to refuse to admit the applicant to bail.

Mr. Makore's rejoinder was a reiteration of what he submitted in chief, without anything new.

From these brief submissions, the singular issue for determination is whether conditions exist for grant of bail pending appeal.

The law is quite explicit on this aspect. It is to the effect that admitting a convict to bail pending determination of his appeal rests on his ability to fulfil all key conditions precedent. These include; existence of exceptional circumstances; and satisfaction that the pending appeal stands overwhelming chances of success. Fulfilment of these conditions must be exhibited in the affidavit that supports the application. The rationale for the stringency that goes with this is not hard to discern. It is simply as alluded to by Ms. Manja. Put it in different words, bail is, at this stage of the criminal cycle, a discretionary remedy that is no longer premised on the presumption of innocence, as the applicant is a convict who should see out his custodial term. It is based on extraneous factors such as ill health and prospects of overwhelming success in the pending appeal.

This postulation was accentuated through a decision of the High Court of Tanganyika in ***Raghar Singh Lamba v. Republic*** [1958] 1 E.A. 337. In recent times, application of said reasoning featured in a number of decisions, including the cases of ***Lawrence Mateso v. Republic*** (supra); ***Soud Khalfan @ Mtafuni v. Republic*** (supra), cited by Mr. Makore; and ***Amon Mulotwa Mwalupindi v. The Director of Public Prosecutions***, CAT-Criminal Application No. 09/05 of 2020 (unreported). In the latter, it was held:

"Where a person is awaiting trial, the onus of proving his guilt 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 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"

While the foregoing excerpt provides the justification for stringent often demonstrated by courts in granting bail, the decision in ***Soud Khalfan @ Mtafuni v. Republic*** (supra) has graciously broken the key requirements into six imperative conditions a court must be minded of. These are:

"(i) That the applicant has already lodged an appeal against conviction and sentence;

- (ii) *That the appeal is not frivolous (meaning is has a chance of succeeding)*
- (iii) *That there is firm undertaking to secure the appellant's attendance in Court when the appeal comes for hearing;*
- (iv) *That the offence of which the person has been convicted is bailable and the person has been on bail before conviction;*
- (v) *That keeping him in custody as he appeals is not in public interest; and*
- (vi) *Existence of any special individual circumstances relating to physical and/or mental health, or harm to the applicant or his family if he is not released on bail."*

The question that follows the foregoing is whether these conditions are prevalent in the instant application.

With respect to chances of success, I borrow the reasoning from my Brother in the ***Soud Khalfan @ Mtafuni v. Republic*** (supra), that stating with precision that the appeal will succeed is to indulge in a speculation as success in an appeal is not dependent only on the well crafting of the grounds of appeal. It also entails making sense of the testimony adduced during trial, a responsibility that is bestowed on the Court when it sits to determine the appeal. At this stage, my work is cut down to only making a

pronouncement that there is a triable case and that the appeal is not frivolous. On this, my contention is that there is a strong arguable case in respect of the appeal, and that serious legal issues, that touch on the propriety of the charge and charging provisions, are at stake and await determination.

Regarding whether the offence he was charged with and convicted of is bailable, the answer is that it is and the undisputed fact is that the applicant was out on bail up until his conviction. The fact that has not been controverted, as well, is that the applicant is a first offender who served his bail spell without any problems. He attended to his case without any blemishes, as well. This suggests that he has reliable sureties who fulfilled bail and bond conditions.

Issues of ill health have been sufficiently covered and, though Ms. Manja has correctly stated that the prison facilities are available to him, my conviction is that the nature of his ailment requires not only proper medication but also dietary restrictions which are hard to observe when an ailing person is in incarceration. This convinces me that the applicant's special circumstances call for favourable consideration of the application.

In view of the foregoing, I accede to the prayer and admit the applicant to bail, subject to fulfilment of the following conditions:

1. The applicant will sign a bond worth TZS. 20,000,000/= with two reliable sureties. The bond sum is for each of the two sureties;
2. One of the sureties must be an employee of the government of the United Republic of Tanzania or a parastatal organization within the United Republic of Tanzania;
3. That the applicant shall surrender his passport or any travel document to the Court, and that such documents shall remain in the custody of Court for the entirety of the appeal proceedings;
4. That one of the sureties must own an immovable property which is duly registered and that the certificate of occupancy in respect of the surety's ownership shall be deposited in Court;
5. That the Deputy Registrar of the Court shall verify authenticity or validity of the documents and oversee implementation of the terms imposed on the applicant and his sureties.

Order accordingly.

DATED at **DAR ES SALAAM** this 29th day of August, 2022.



M.K. ISMAIL

JUDGE

29.08.2022

