

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

AT DAR ES SALAAM

MISC CRIMINAL APPLICATION NO. 130 OF 2022

(Originating from Criminal Appeal No. 136 of 2022 pending in the High Court of Tanzania, Dar es Salaam, District Registry)

YUSUPH AWAZI KOMBAAPPLICANT

VERSUS

REPUBLIC..... RESPONDENT

Date of last Order: 03/10/2022

Date of Ruling: 10/10/2022

RULING

MGONYA, J.

This is the Application for Bail Pending Appeal brought under the Certificate of Urgency. The same has been brought under **Section 368(i) (a) (i) of the Criminal Procedure Act, Cap. 20 [R. E. 2022]**, seeking from this honorable court for the following orders:

1. That the Honourable Court be pleased to grant bail to the Appellant pending the determination of his appeal,
2. That, the Honorable court be pleased to fix reasonable bail conditions to the Applicant.

The Chamber Summons is brought at the instance of the Applicant herein and it is supported by the Affidavit duly sworn by Applicant himself where he averred that; he was charged and convicted before the District Court of Mkuranga with an offence of theft **c/s 258 (1) and 265 of the Penal Code Cap. 16 [R. E. 2002], in Criminal Case No. 124 of 2021.** As the result of the judgment in that case, he was sentenced to three (3) years' imprisonment. Being aggrieved with the decision, he filed **Criminal Appeal No. 136 of 2022** which is pending before this court. He further states that, his appeal he has a great chance of succeeding due to fundamental errors in both facts and law.

When the matter was called for hearing both the Applicant and the Respondent were represented by Beria Andrea, Advocate and Ms. Rehema Mgimba State Attorney respectively. Submitting in support of the Application, Mr. Beria prefaced his submission by praying the court to adopt the affidavit to be part of their submission. He went on to state that the prayer is premised on the major issue that the Applicant has big chance of succeeding the Appeal. He relied on the case of **LAWRENCE MATEO VS R, CRIMINAL CASE NO. 66 [1996] TLR 118** and the case of **JIVRAJ SHAH Vs. R, 1986 ECLR.**

In reply, Ms. Mgimba the learned State Attorney began to challenge the Application to be brought under certificate of urgency while there is no any urgency to that effect. She went on to state that, no sufficient reason has been stated in the affidavit despite the fact that it is upon discretion of the court to grant the application. In her view there is no peculiar/unusual circumstances that can be taken by the court to grant Application at hand. Ms. Mgimba insisted that the application be dismissed for being meritless.

In his rejoinder, Mr. Beria reiterate what he submitted in submission in chief. He insisted this court to grant the application as the applicant did not jump bail before and further to that it can assist reducing prisoners' congestion.

Having heard the rival submissions made by the parties, this court finds that the issue for determination is whether there is a reasonable /sufficient cause for granting bail pending appeal to the Applicant.

I am alive of the law and conditions applicable in this kind of Application. The law on this matter is:

First, starting from the premises that while bail pending trial is a right to the accused person, bail pending appeal is not. It should not be forgotten that, the applicant in a bail pending appeal is a convict already. 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. See **MELLAN MAREERE Vs. UGANDA** [2018] UGCA 31 quoted by the Court of Appeal in the case of **AMON MULOTWA MWALUPINDI VS. THE DIRECTOR OF PUBLIC PROSECUTIONS**, Criminal Application No. 09/06 of 2020 (Unreported) The onus is, therefore, on him to prove that justice demands that he be out on bail rather than inside.

Second, that Bail pending appeal should only be granted for "exceptional and unusual reasons". Courts of law have not tabulated what these exceptional and unusual reasons could be; but of course, each case, therefore, would have to be considered on its own merits and circumstances **(RAGHBIR SINGH HOMBE VR [1958] E.A. 337);**

Third, neither the complexity of the case nor the good character or social standing of the applicant nor alleged hardship of parents or dependents justifies grant of bail pending appeal;

Fourth, delay before the actual appeal is heard is not in itself a good ground for granting bail pending appeal. **[GIRDHER BHANJINASRANI E R. [1960] EA 320];**

Fifth, that Bail pending appeal could be granted if there are overwhelming chances of success in the intended appeal. See

R. E SAKERBAI M. A. GANGI [1967] H. G. D. N. 243 HASSAN ALIHALJIE R. [1968] H. C D. N 174; ATLILIO S/O MOSOA R V [1968] H. C. D N. 295 MIPAWA [1971] H. C. D N 62;]. However, it cannot be said, where an argument on the facts of a case would need a careful analysis at the appellate level, that it would be easy to say that an appeal has overwhelming chances of success; and

Sixth, there, is no principle of law which says that a person released on bail pending appeal will not be sent back to prison if his appeal fails. My considered view on the subject is that one suggested by our brother Samatta, J. (as he then was) in **ABEL MWANGENDE V. R MISC. CRIMINAL CAUSE No. 326/1988 - DODOMA**, when he stated that:

"The task of deciding whether a person who has been convicted should be granted bail involves balancing the considerations of the liberty of the individual and proper administration of Justice."

Going through the records of this Application especially the Affidavit deponed by the Applicant and the submission from his counsel, the only reason raised to persuade this court to grant the bail is the **overwhelming chances of success in the pending appeal**. In paragraph 5 of the affidavit the Applicant

averred that, the conviction relied on weak evidence of the CCTV footages which were illegally obtained and that there was no proper identification. Digging on the two points of success raised by the appellant, I find the same will attract a careful analysis at the appellate level. What the Appellant saw does not necessarily or guarantee that even the Appellate Court will have the same findings. It has been stated by the court of appeal in the case of **TANZANIA POSTS & TELECOMMUNICATION CORPORATION VS M/S H. S. HENRITTA SUPPLIES T.L.R.** 141, that;

"It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides."

Being guided with the wisdom of the above authority, it is my considerate view that, the reason that his Appeal has a great chance of success is prematurely raised as hearing of their argument is yet and also that reason solely without existence of any unusual or exceptional reasons is not sufficient to warrant the bail pending appeal application. I have to be frank to the

Applicant that to grant such a serious Application under the said reason, will be tantamount to open a Pandora's box as lodging an appeal will be used as a means to evade statutory sentence.

In the event therefore, I found that there is no reasonable /sufficient cause for granting bail pending appeal as sought by the Applicant. Henceforth, **I proceed to dismiss the instant Application in its entirety for being devoid of merit.**

It is so ordered.



L. E. MGONYA

JUDGE

10/10/2022