

**IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MTWARA)**

**AT MTWARA**

**CRIMINAL APPLICATION NO.53 OF 2022**

*(Arising from Criminal Appeal No. 76 of 2022 pending in this Court and  
Criminal Case No. 2 of 2021 Lindi Rm's Court)*

**SALUM OTHMAN MBEZI.....APPLICANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

**Muruke, J.**

Salum Othman Mbezi, was convicted by the district court of Lindi in Criminal Case number 2 of 2021, on 29<sup>th</sup> July 2022. Apart from filing appeal, he has filed an application for bail pending appeal, supported by an affidavit sworn by Fatuma Issa Majalla. Respondent counsel did not file counter affidavit, but objected the grant of bail on the reason that there are no special circumstances warranting the same, citing case of Court of Appeal of Amon Mulotwa Mwalupindi Vs Director of Public Prosecution, criminal application number 09<sup>th</sup> June 2020.

Applicant counsel, Steven Lekey, apart from adopting affidavit in support of the application, insisted that, applicant health is in jeopardy in terms of



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hospital document attached in the affidavit in support of the application. He thus requested this court to grant bail as sickness is sufficient cause for bail pending appeal.

According to the procedure in criminal cases, bail pending appeal is governed by section 368 of the Criminal Procedure Act, Cap. 20 R.E 2022. The specific provision used to move his court of grant ball is section 368 (1) (a) (i) which read: -

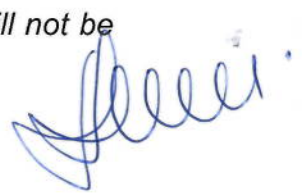
***“368 – (1) After the entering of an appeal by a person entitled to appeal, the High Court of the subordinated court which convicted or sentenced such person may, for reasonable cause to be recorded by it in writing-***

***(a) In the case of a person sentenced to a term of imprisonment, order  
(b) (i) that such person be released on bail with or without sureties pending the hearing of his appeal;”***

The above provision allows bail pending upon reasonable cause being shown and recorded by court.

Legally, in an application for grant of bail pending trial and appeal, 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. It therefore 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 jeopardized by granted bail pending appeal.*



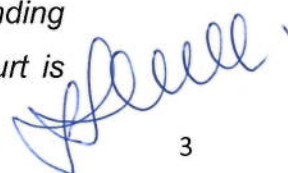
2. *In deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice.*
3. *The applicant must show existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in interest of justice to grant bail.*
4. *If it appears prima facie the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued.*

The above principals were discussed in the case of Chimambhai vs Republic (No. 2) [1971] E.A 343 at 345 whereby it was stated:

*"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 today frankly recognize, to an extent at one – time unknown, the possibility of the conviction being erroneous or the punishment excessive ...."*

Bail pending appeal was discussed also in the case of Lawrence Mateso V. Republic [1996] T. L. R 118 in which the principles for the grant of bail pending appeal were summarized thus: -

- i. *"That bail is right applicable only to cases where the accused person has not yet been convicted;*
- ii. *Bail pending an appeal can be granted only where there are exceptional and unusual reasons or where there is an overwhelming probability that the appeal would succeed;*
- iii. *Where an argument on the facts needs detailed references to the text of the evidence or the judgment to support it, it cannot be said that the appeal has overwhelming chances of success;*
- iv. *Since no general principle exists that a person released on bail pending appeal will not be sent back to prison if his appeal fails, the court is*





*reluctant to order that a convicted person be released on bail pending the outcome of the appeal;*

- v. *Deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice”*

I have considered affidavit in support of the application and submission by both counsel, there is serious issue of applicant health in terms of annexure B averred at paragraph two of affidavit sworn by Fatima Issa Majala, applicant mother. Respondent counsel has not said much on the serious issue of applicant health. By attaching document annexure “B”, hospital documents in the affidavit in support of the application, is an evidence that, applicant is sick person. Respondent counsel has not filed counter affidavit to refute allegation of sickness raised by applicant. Affidavit being sworn evidence, need to be countered, by evidence by way of counter affidavit. In the absence of counter affidavit to refute the contents of paragraph 2 on the sickness of applicant, the averments remain to be believed.

In the circumstances of this case, ill health of applicant is sufficient cause to grant bail. Thus, applicant is granted bail pending appeal on the following conditions

1. Two sureties who will execute bond of 48,960,980.05 Tshs each.
2. Two sureties to surrender their traveling documents if any, and National identification card.
3. Two sureties to ensure that, applicant appear on his pending appeal before this court without fail.
4. Applicant should not leave Lindi or Dar es salaam regions, without written permission from register of this court.



5. Applicant to remain in custody until bail conditions are met.
6. District Registrar of this court to ensure compliance of bail conditions.



A handwritten signature in blue ink, appearing to read "Z. G. Muruke".

**Z. G. Muruke**

**Judge**

**31/10/2022**

Ruling delivered in the presence of Enosh Kigoryo State Attorney for the respondent and Mr. Steven Lekey counsel for the applicant.



A handwritten signature in blue ink, appearing to read "Z. G. Muruke".

**Z. G. Muruke**

**Judge**

**31/10/2022**