

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**MISC. CRIMINAL APPLICATION NO. 68 OF 2022**

*(Originating from Economic Case no. 05 of 2022 before the District Court of Arumeru)*

**GODLIZEN S/O ANDREA.....APPLICANT**

**VERSUS**

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

**RULING**

*Date of last order 19/12/2022*

*Date of ruling 22/12/2022*

**BADE J**

The Applicant made this application under section 368 (1) (a) (i) of the Criminal Procedure Act [Cap 20 RE 2022]. He moved this Court by way of chamber summons with supported by an affidavit. His prayers are as shown below.

- i. That, this Honourable Court be pleased to admit the Applicant to bail pending hearing and determination of the Criminal Appeal No. 157 of 2022 filed before this court and assigned before Honourable Judge Bade J, and the Appeal was scheduled for mention on the 7<sup>th</sup> of December 2022.

- ii. Any other order(s) the Honourable Court deems proper to grant in the circumstances of the application.

This application emanates from the economic case no. 05 of 2022 before the District Court of Arumeru, the Applicant was charged with the offence of unlawful possession of the Government Trophies contrary to section 86(1)(2)(c) of the Wildlife Conservation Act, Act No. 5 of 2009 as amended by section 59(a) and (b) of the written Laws (Miscellaneous Amendments) Act No. 2, No.4 of 2016 read together with paragraph 14 of the 1<sup>st</sup> schedule and section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [cap 200 R:E 2002] as amended. Upon hearing the said case, the trial court entered conviction against the Applicant and sentenced him to 20 years' imprisonment on the 28<sup>th</sup> of September 2022. Being aggrieved by the said judgment, the Appellant appealed before this court vide Criminal Appeal No. 157 of 2022. While the said appeal is pending, an applicant filed this application for bail pending appeal.

Parties argued this application by way of oral submissions. The learned counsel for the applicant submitted that, they pray to adopt their chamber summons and affidavit in support of their application. The learned counsel further submitted that, the applicant as adduced under paragraph 3 of his

affidavit, he is sick and he was registered for church sacrament on the 17<sup>th</sup> December 2022. The learned Advocate also submitted that under paragraph 4 of their affidavit it is clearly shown that the Applicant acted obediently as per the bail conditions set by the Trial Court, he further stated that he has never jumped bail before the trial court.

The Applicant's learned counsel made further arguments before this court, that the applicant's intended sureties are reliable and for the interest of justice they will always be available during the pendency of Criminal Appeal No. 157 of 2022.

Lastly the learned counsel submitted that, there is an overwhelming chance of success in Criminal Appeal No. 157 of 2022, the reason behind his expectation is that there are points of laws raised in the appeal. He continued to argue that there was failure by the prosecution to have an independent witness but also the certificate of seizure doesn't contain the name of the witness. The Counsel continued to state that there were also some errors in maintenance of the chain of custody. The learned counsel summed up his submissions by praying this court to grant an applicant the bail pending appeal. The Counsel substantiated his arguments with various cases including that of **EA Cables Ltd vs Spensos Services Ltd (Misc.**

**Application No. 61 of 2016) and Ally Baruani Macho vs Republic (Misc. Criminal Application No. 191 of 2020).**

In reply submissions, the learned State Attorney refuted the fact adduced at paragraph 3 of the Applicant's affidavit that the applicant is sick and he is supposed to attend the church sacrament on the 17<sup>th</sup> December 2022. The learned State Attorney further submitted that, there is no proof that the applicant was sick and has not told this court that it is difficult for his condition to be medically attended while in prison. The fact that he has to attend sacrament also lacks merit as it has been overtaken by event since the day for the said sacrament was on the 17<sup>th</sup> December 2022 while this hearing was happening on 19<sup>th</sup> December 2022.

With regards to the overwhelming chances of success in the applicant's Criminal Appeal, the learned State Attorney submitted that the errors making the appellant to have such expectations are supposed to be on the face of records not otherwise, she stated that as she has passed through the trial court's proceedings and the judgment, she finds nothing regarding the apparent errors on the face of the record. She finally pray that this court to dismiss this application for lack of merit.

*This Court's issue for consideration is whether this application for bail pending appeal is maintainable.*

In dealing with the above issue, this Court thought it prudent to cite section 368 (1) (a) (i) of the Criminal Procedure Act, [Cap 20 RE 2022] which provides "*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 .. in the case of a person sentenced to a term of imprisonment, order ... that such person be released on bail with or without sureties pending the hearing of his appeal.*"

The above position, has been scrutinized by various Court's decisions with regards to the grounds leading to the grant of bail pending appeal. In the case of **Amon Mlotwa Mwalupimbi vs DPP**, Criminal Application No. 9/6 of 2020, Court of Appeals Tanzania at Mbeya, cited with approval the case of **Lawrence Mateso vs R, (1996) TLR 118 (HC)**. The Court listed basic conditions necessary for the granting of 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.*

In line with the above basic conditions subscribed by the Court of Appeal, it suffices to say, bail pending appeal is more of a privilege rather than such right guaranteed by the Constitution - that a person has to be presumed innocent till the Court rebut the said presumption. The Court of Appeal at Mbeya in the case of **Amon Mulotwa Mwalupimbi vs DPP (supra)** made reference to the cases of other jurisdiction like the one of Uganda in **Mellan Mareere vs Uganda [2018] UGCA 31** where 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."*

This is aptly represented by the fact that the Trial Court had previously entered a conviction against him and sentenced him. The fact that the applicant has acted obediently as per the bail conditions set by the trial court

at this stage lacks focus, since before the trial court he was presumed innocent as he was not yet convicted. In contradiction, he is now a convicted prisoner serving his sentence, that being the case he might use that chance to escape and defeat justice. I second the view of the learned State Attorney that this ground lacks merit and cannot sustain.

With regards to the ground of illness, it is my considered view that the Applicant has not taken initiative to prove such illness. Illness falls under the condition of unusual or exceptional circumstances under the requirement that an applicant has to prove beyond reasonable doubt he is ill, and that in case he is granted bail pending appeal, his liberty will not jeopardize justice. In proving beyond reasonable doubt, this Court expected the Applicant to attach to his affidavit, some document from the medical practitioners in support of the facts as adduced in the affidavit. His ground turned out to be an empty cry since medical practitioners are the ones authorized to diagnose illnesses. Surely even with challenges abound within our prison system as put forth by the Applicant's counsel when probed by the Court during hearing of the Application, he had no plausible response as to why there is no proof of the applicant's illness. I join hands with the learned State Attorney that this ground too lacks merit.

The learned counsel for the Applicant also argued that, there are overwhelming chances of success in the filed Criminal Appeal No. 157 of 2022. This is among the basic conditions established in **Lawrence Mateso vs Republic** (supra). An appellant has not shown this Court the basis of his expectation to succeed in the said appeal, he was supposed to point out and show the apparent errors on the face of the records; while refraining from raising the grounds which needs determination by the Court at the appellate stage. The fact that there was no independent witness during his search and seizure attracts matters of factual disposition on evidence, which the Court cannot be moved to look into and determine at this stage. I concur with the learned State Attorney that this ground is equally destitute of merit like the previous grounds.

Let me hasten to say that the grant of bail pending appeal is purely discretionary, and I am well aware that the said discretion must be exercised judiciously, that is to say based on individualized evaluation and guided by the principles of law. I have soundly looked at the presented conditions and evaluate the same including the unusual or exceptional circumstances which are peculiar to this specific case. I have also applied my mind on balancing the liberty of the individual who is the applicant in this case; and the jeopardy

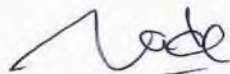


against the administration of justice as provided by the conditions precedent under the case of **Lawrence Mateso vs Republic** (supra).

In the upshot, I find that this application is unmaintainable and it is hereby dismissed.

Ordered accordingly.

**DATED** at **ARUSHA** on the 22<sup>nd</sup> December 2022.



**A.Z. BADE**  
**JUDGE**

