IN HIGH THE COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS CRIMINAL APPLICATION NO.6 OF 2022

(Originating from the Resident Magistrates' Court of Mtwara in Mtwara in Economic Case No.1 of 2022)

ARMELINDO ANIBAL GANHANE..... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 7/3/2022
Date of Ruling: 9/5/2022

LALTAIKA, J.

This is an application for bail pending trial preferred by the applicant, **ARMELINDO ANIBAL GANHANE**. The application is made under section 29(4)(d) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2019] and Section 392A(1) and (2) of the Criminal Procedure Act [Cap 20 R.E. 2019]. The application is supported by an affidavit of the applicant sworn on 11.02.2022. The respondent Republic, on her part, did file a counter affidavit in opposition of the application sworn on 7/3/2022 by Mr. Wilbroad Ndunguru, learned Senior State Attorney.

As hinted above, this application stems from the Economic Case No.1 of 2021 pending trial before the Resident Magistrates' Court of Mtwara at Mtwara. In the said case, the applicant is charged with the offence of unlawful possession of government trophy contrary to section 86(1), (2) (b) and (3)(b) of the Wildlife Conservation Act No.5 of 2009 as amended by Section 61 of the Written Laws (Miscellaneous Amendments) (No. 2) Act of 2016 read together with paragraph 14 of the first schedule to and section 57(1) of the Economic and Organised Crime Control Act.

The particulars of the offence are to the effect that on the 7th day of December, 2021 at Masasi Police Station area within Masasi District in Mtwara Region, the applicant was found in unlawful possession of Government Trophy to wit; two (2) rhinoceros horns valued at Tanzanian Shillings Eighty eight Millions, Three Hundred Fifty Thousands (Tzs.88,350,000/=) only, being the property of the Government of the United Republic of Tanzania without having any written permit or licence previously sought and obtained from the Director of Wildlife.

When this application was called on for hearing the applicant appeared in court enjoying legal services of Mr. Rainery Songea, learned advocate. Mr. Wilbroad Ndunguru, learned Senior State Attorney represented the respondent.

As the hearing commenced, Mr. Songea submitted that upon receiving the counter affidavit and going through it, he realised that the respondent does not object the application especially under paragraphs 4,6 and 7 but was tasking them to prove the facts deponed in the applicant's affidavit.

It is Mr. Songea's submission that since the affidavit stood on facts, he expected the counter affidavit to specifically contradict such facts. The

learned counsel submitted further that bail is a constitutional right as provided for under Article 13(6)(b) of the Constitution of the United Republic of Tanzania. To that end, the learned counsel prayed for the grant of the application. He averred that the applicant was ready to comply with the conditions to be set by this court.

In response, Mr. Ndunguru did not object the grant of the bail to the applicant. Nevertheless, the learned Senior State Attorney stressed that the affidavit of the applicant, as it reads, brings about issues that needed to be proven. The learned senior state attorney submitted that paragraph eight of the affidavit does not state specifically that the applicant is a citizen of Mozambique.

Mr. Ndunguru went on to submit further that the affidavit of the applicant does not state the place where the applicant would be living during the pendency of the trial either in Tanzania or Mozambique. In view of these arguments Mr. Ndunguru emphasised that the respondent needed proof as per para 6 of the counter affidavit.

It is Mr. Ndunguru's submission that although the applicant is a Mozambican national, it wasn't possible to rule out chances that he possessed another nationality or more than one citizenship. The learned counsel stressed that the assertion that the applicant is a responsible citizen is not enough and prayed that his counsel is tasked the provide proof thereof.

With regards to the contents of the affidavit, Mr. Ndunguru submitted that he had noted that the applicant contended that he has permanent abode and reliable sureties. However, Mr. Ndunguru argued, it was his expectation that applicant's sworn affidavit would disclose the

whereabouts of the sureties either here in Tanzania or in Mozambique. The learned senior State Attorney stressed that although this court is empowered to set conditions for bail pending trial, it was advisable that the court knew the exact place where the sureties are expected to come from and whether they happen to know the applicant well enough.

With regards to bail as a constitutional right, Mr. Ndunguru maintained that he was aware of that and in principle he was not objecting the application. However, the learned Senior State Attorney averred, the affidavit was too inadequately crafted to enable the court to believe that the applicant can be trusted and granted the prayer. He went further and submitted that since an affidavit carries facts which are tested before the court with parities, if this court is convinced, he prayed that this court orders re filing of the affidavit with elaborate facts deponed for purposes of this application.

In a brief rejoinder, Mr. Songea submitted that what the learned Senior State Attorney had addressed the court on are not a part of the counter affidavit. He further contended that the facts were supposed to be in the affidavit. The learned Counsel stressed that it was obvious the respondent was disputing though he was aware that a counter affidavit is not the same as a Written Statement of Defence (WSD). Mr. Songea further argued that if the respondent was objecting the application, he needed to explain specifically why he was doing so.

Focusing his attention on the affidavit of the applicant. Mr. Songea averred that at paragraphs 8 and 9 of the same, it was clear that the applicant is a national of Mozambique. It is Mr. Songea's submission that it was upon the court to set conditions for grant of the bail applied for and

that the applicant was ready to comply with such conditions. The learned Counsel is of the view that querying the nationality of those who would be sureties or refiling the affidavit was not right. The learned Counsel invited this court to set conditions as it deems fit without regards to the nationality of the sureties.

To wind up on his rejoinder, the learned Counsel averred that our laws are clear that bail is a right to any one be it a Tanzanian or foreigner. To that end, Mr. Songea maintained that the applicant's affidavit was self-explanatory. It is Mr. Songea's prayer that the bail be granted because the offence is bailable and that the applicant is ready to comply with the conditions of the bail as will be set by the court.

On the 9th of March 2021 in the course of compiling a ruling on this application, it became obvious that this court needed to be furnished with sufficient information to enable it make a reasonable and fair decision. To that end and in the interest of justice, I ordered counsels for both parties to address me on the following point item:

1. Status of residence of the applicant **ARMELINDO ANIBAL GANHANE**

When the application came for hearing pursuant to the above order, the applicant appeared under custody while enjoying legal services of Ms. Acrala Blanket, learned Advocate. The respondent Republic, on her part, was represented by Mr. Wilbroad Ndunguru, Senior State Attorney.

Ms. Blanket started off by announcing that she was going to rely on the SADC [Southern Africa Development Community's] Protocol on

Extradition of 2002 and some Tanzanian case law authorities and that she was going to share copies of the same with this court.

It is Ms. Blanket's submission that the applicant ARMELINDO ANIBAL GANHANE is a resident and national of Mozambique and that he has relatives who are Tanzanians, living in Dar es Salaam. The learned Counsel asserted (without going into the details) that such relatives have immovable property.

Ms. Blanket opined that the intention of the court in ordering counsels to address it on the status of residence of the applicant is to be assured that upon the applicant being granted bail, he would be able to attend court sessions on the charges upon him as would be scheduled by the court.

Having so reasoned, the learned counsel averred that since the applicant has relatives in Dar, the relatives would ensure that the applicant comes to court as required.

It is Ms. Blanket's assertion further that in case the applicant is granted bail and goes against the bail conditions, Tanzanian is able to bring him back from his country of residency (Mozambique) because Tanzania and Mozambique are signatories to the SADC Protocol on Extradition (supra).

Citing Article 3 of the Protocol, the learned counsel averred those offences that are extraditable as per the Protocol include those that are punishable by laws of both state parties by imprisonment or other deprivation of liberty for a period of at least one year or by a more severe penalty. Ms. Blanket is confident that the offence for which the applicant is charged falls under the article cited. Irrespective of being so sure, Ms.

Blanket added that if the applicant is granted bail, he won't be able to leave Tanzania procedurally because his passport is under police custody.

Having exhausted on the Protocol, Ms. Blanket moved to the Constitution. She asserted that it was apparent that bail is a constitutional right and everyone has a right to be admitted to bail.

The learned Counsel cited section 29(4)(d) and 36(1) of the Economic and Organized Crimes Control Act RE 2019 asserting that there is no specific mention of whether bail is for nationals only or even foreigners. To that end, the learned counsel opined, it was the court's discretion to grant bail and set conditions which the applicant would be required to comply with. In case of failure to do so, the learned counsel went on submitting, that would be clear that the applicant is the one who had failed to comply with the conditions.

To buttress her argument, Ms. Blanket cited the case of **Khalifani Hussein Kaengele and 8 others V. R.** Misc. Crim. App 64 of 2020 and **Edwin Gusongoinye and another v. R.** HCT The Corruption and Economic Crimes Division, Dar es Salaam Misc. Econ. Cause 28 of 2017. It is Ms. Blanket's submission that in these cases, foreigners were involved in application for bail and they were granted irrespective of being foreigners. The learned counsel emphasized that in these cases, it was stated that foreigners should not be treated differently in our courts because they are foreigners. She concluded her submission by a prayer that the court takes cognizance of the grounds she had argued and grant bail to the applicant.

It was time for Mr. Ndunguru, senior State Attorney to respond on behalf of the respondent Republic.

It is Mr. Ndunguru's submission that the residence of the applicant had not been proved by his counsel. The learned Senior State Attorney averred that the applicant was arrested with government trophy as alleged, and to date, it hasn't been established whether he came to Tanzania legally or not even though he was in possession of a passport which is being held by the police. Mr. Ndunguru asserted further that it was yet to be established for how long the applicant had been in the country before he was arrested.

It is Mr. Ndunguru's submission that although granting [or refusing] bail is a discretion of the court as per Section 36 of the EOCA Cap 200 RE 2019 read in tandem with section 248 of the Criminal Procedure Act Cap 20 RE 2019, all these sections provide direction to the court on how to grant bail on all offences except a few of them that are unbailable.

Mr. Ndunguru averred that admitting the appellant to bail was risky for four reasons as summarized below:

(i) The applicant is a national of Mozambique with relatives in Dar who have immovable property as asserted by the learned counsel without giving details. We are of the opinion that such viability hasn't been well established by counsel for the applicant.

(ii) The respondent republic is not informed whether the applicant is legally in the country and for how long.

(iii) The interaction between Tanzanians and Mozambicans in Mtwara is very high. Anyone can go back and forth by ways

known to him/her withholding the applicant's passport won't help.

(iv) In case the court admits the applicant to bail, he may not stay in Tanzania for a long time. If he goes to Mozambique, bringing him back to Tanzania would be a a long and expensive process

The learned counsel concluded his submission by asserting that he was of a strong view that although the court has a final say on bail, and that bail is a right of the applicant, the court is also not duty bound to grant it if it sees that doing so isn't viable as he had just submitted.

In a rejoinder, Ms. Blanket averred that for anyone to enter into the United Republic of Tanzania, he/she must be in possession of the right travel documents as it was the case with the applicant when he was arrested.

The learned counsel asserted that the same was proven by the State Attorney in his submission that the applicant was arrested with a passport which is still held by the police. To that end, the learned counsel asserted further, the applicant a legal traveler.

With regards to interaction between Mozambicans and Tanzanians in Mtwara it is Ms. Blanket's submission that such an assertion should not be used as a bar for granting bail to the applicant because, the interaction between Tanzania and Mozambique is the same as that of Tanzania and any other country with which it shares the border and that, such interaction is based on economic and commercial matters.

Having dispassionately and attentively considered submissions by both parties, the ball is upon my court to decide on whether or not to grant the application. I am guided by among other things, the Constitution of the United Republic of Tanzania of 1977, relevant statutes, case law and, more importantly the discretion vested upon me, which discretion, however, must be exercised judiciously. I will expound of these guide posts albeit briefly shortly:

The Constitution of the United Republic of Tanzania provides for presumption of innocence. An accused person is presumed to be innocent until proven so by a competent court of law. It follows therefore that an accused person has a right to be admitted to bail pending trial as the case may be upon fulfilment of the conditions if any issued by the court. Likewise, the same constitution provides that administration of justice in both criminal and civil matters in vested in the judiciary.

At the level of the Statutes, there are several statutes that have a bearing on bail. These include the Criminal Procedure Act Cap 200 RE 2022 and the Economic and Organized Crimes Control Act. It is at the level of statutory law that we find bailable and non bailable offences. This is in spite of the fact that, as hinted above bail is indeed a constitutional right.

At the level of case law, there are leading cases of the Apex Court of this country that provide for the importance of admitting accused persons to bail pending trial.

I have taken time to reflect on this particular application. My mind has been exercised in the how to strike the right balance between the rights of an accused and this court's function of dispensing justice.

I requested more information on the status of the accused person's residence. I am afraid that this has not been adequately covered. The learned counsel who addressed me on this (Ms. Acrala Blanket) spent a big deal of her time expounding on the extradition protocol as explained above and very little information if any on the applicant's residence. She has only mentioned that the applicant has relatives in Dar. No details have been provided.

When a court is deliberating on whether or not to grant bail, it's main task is to strike the right balance between the rights of an accused person on one hand and administration of justice on the other. In my attempt to achieve that balance four parameters were considered and, as will be evident, the pendulum has swung towards the denial than granting

1. The type of offence: although the offence with which the applicant is charged is bailable, there is no doubt that wildlife related offences especially involving endangered species are a serious international concern. I do not want to go to the details because the trial is yet to commence but suffices it to say that the international community is seriously following all offences related to illegal poaching in general and international trade in endangered species of wild flora and fauna in particular. It is only fair to expect that the courts in Tanzania, a global leader and icon in

nature conservation will be fair but firm in dealing with wildlife related offences. It is my considered view that both parties stand to benefit if the matter goes to trial seamlessly.

2. Likelihood of delay: I have deliberated upon this and it is apparent that the courts in Mtwara zone are some of the best performing courts in the country with fewer backlog cases. It is therefore my considered view that as soon as other stakeholders in the prosecution machinery are ready, there will not be any reason to delay the hearing and final disposition of the matter.

3. Residence status: it is unfortunate, as already alluded to, that the learned counsel has spent so much time on the extradition process and very little effort if any on residence status of the applicant

4. Interaction: the learned counsel for the respondent had alluded that the interaction between Tanzanians and Mozambicans in Mtwara is unexceptionally high. That is not a negative thing. However, in case the applicant jumps bail, it does not take much thought to realize that his exit into his mother land of Mozambique will be easier as contended by the learned counsel for the respondent. I also agree with Mr. Ndunguru that implementing the SADC extradition treaty is costly. Since prevention is better than cure, I choose to prevent spending resources for extraditing an accused person who can safely be remanded pending final determination of his case.

In the upshot, the application for bail is hereby denied.

It is so ordered

E.I. LALTAIKA

JUDGE

9/5/2022

Court

This ruling is delivered under my hand and the seal of this Court on this 9th day of May 2022 in the presence of Mr. Enosh Kigoryo, learned Senior State Attorney, Ms. Priscila Mapinda, learned Counsel for the applicant and the applicant.

E. LALTAIKA

JUDGE

16.03.2022