

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CRIMINAL APPLICATION NO. 14 OF 2022

*(Originating from Economic Case No. 175 of 2021 in the District of
Nachingwea at Nachingwea Lindi Region)*

OLIVER THOBIAS HOKOROROAPPLICANT

VERSUS

THE REPUBLICRESPONDENT

Date of Hearing: 28/03/2022

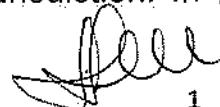
Date of Ruling: 31/03/2022

RULING

Muruke, J.

Applicant was charged with an offence of attempted murder contrary to section 211(a) of the Penal Code Cap 16 R.E 2019, at the District Court of Nachingwea, at Lindi. He has filed an application before this court for bail pending trial. Application is supported by an affidavit sworn by applicant himself. Respondent did not file counter affidavit, and on the date set for hearing, Wilbroad Ndunguru, Senior State Attorney did not object granting of bail, he only insisted, on the law to be followed.

Having gone through affidavit in support of application it is worth noting that, in Tanzania Legal System, bail of an accused person is his/her constitutional rights. Articles 13(6) of the Constitutional provides that no person charged with a criminal offence shall be treated as guilty of the offence until proven otherwise by a court of competent jurisdiction. In



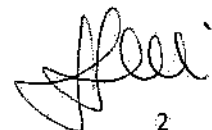
1

determining bail, court shall observe the provisions of Section 148(5) (a) to (e) of the Criminal Procedure Act (CPA), Section 36 (4) of the Economic and Organized Crimes Control Act, or Section 16 of the Primary Court Criminal Procedure Code, as the case may be. In addition to the conditions prescribed under the provisions above, the court shall take into account the following factors:-

- a) Gravity of the offence and severity of the sentence
- b) Security of the accused person.
- c) Protection of the victim.
- d) Possibility that accused might abscond,
- e) Prevention of furtherance of crime
- f) Preservation of public order
- g) Nationality of accused
- h) The nature of the accused person in terms of his social standing, ties with the community etc.
- i) Special circumstances of the accused eg. Illness vulnerability
- j) Period during which the accused may be in remand.
- k) Possibility of the accused interfering with the investigation process.
- l) Age of accused (minor or old age)

According to the charge sheet the offence is bailable. Legally, bail is a right not a privilege to an accused person as correctly held by Mwesumbe, J. in the case of **Tito Douglas Lyimo v. Republic [1978] LRT No.55**, when he insisted that;

- (i) Bail is a right and not a privilege to an accused person.
- (ii) The court may refuse bail on evidence that granting of bail would result in failure of justice or in abuse of the process of the court.



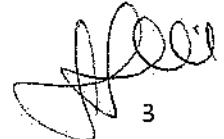
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- (iii) The court should not refuse bail to an accused person as form of punishment; to do so would be to punish the accused before pronouncement of his verdict.
- (iv) The court should be impartial irrespective of whether the accused person is in remand custody or out on bail.
- (v) In refusing to grant bail the trial Magistrate took extraneous factors which portray gross injustice and an abuse of the process of the law.

It is also recognized principal of law that, a person charged with criminal case is innocent until proved guilty, thus, bail is his constitutional rights. Same was held by fully bench of the High Court in the case of **Geofrey Eliawony & 3 others Vs. R [1998] T.L.R 190** that:-

- (1) A person charge with a criminal offence must be presumed innocent until his guilt is proved. Just like the right to fair hearing, this is a fundamental and established common law rule which has been accorded a constitutional footing.
- (2) Denying bail to an accused person does not necessarily amount to treating such person like a convicted person.
- (3) S.35 (3) (g) of the Economic and Organised Crime Control Act, 1984, is not arbitrary; it would be a clear contradiction and an extreme absurdity for a statute to forbid the grant of bail and then make provision for challenging the withholding of the same.
- (4) It cannot be said that Section. 35 (3) (g) of the Economic and Organised Crime Control Act, does not meet the principle of proportionality.

It is true that, bail is a right of an accused unless taken away or restricted by the law. Denial of bail must be accompanied with reasons justified to safeguard public interest. Bail should not be withheld maliciously or as punishment to an accused prior to determination of his



3

accusations, this was the holding of this court Muruke J in the case of **Nguyen Van Chat v. Republic**, 206 T.L.S – LR.8; that:-

- (1) Under our law, an accused person is presumed to be innocent until his guilt has been proved beyond reasonable doubt. Bail is a right, unless the right is taken away or restricted by the law, i.e., s.148 (4) and (5) of the CPA. The grant of bail should only be denied/refused in exceptional circumstances, and provisions governing bailable and non-bailable offences manifest constitutional balance between freedom of the individual in the context of the society he belongs.
- (2) It is not disputed that the offence with which the applicant is charged is bailable. However, whether or not bail should be granted depends on the circumstances of each case. It is now settled law that the proper test of whether bail should be granted or refused to an accused person is whether it is probable that he will, if released, appear for trial up to the conclusion of the proceedings.
- (3) It is true that one of the factors to be taken into consideration when deciding whether or not to admit a person to bail is the availability of independent and reliable sureties. However, the availability of sureties is not the only factor when considering the grant of bail and the risk that the accused will fail to appear at the trial.
- (4) In the instant matter, it is very clear that the applicant is readily offering independent and reliable sureties. Yet, it is not disputed that the applicant is a foreigner with no fixed abode or residence permit allowing him to stay in Tanzania. The fact that he has no fixed abode raises the question as to where he will reside if he is granted bail. While I agree that foreigners should not be treated differently in our jurisdiction, I am of the strong opinion that the applicant being a foreigner, if released on bail, will very likely abscond and fail to attend trial.



According to paragraph 7 and 8 of applicant of affidavit, he is the resident Mchonda village in Mchonda Ward at Nachingwea and that he will be able to meet bail condition if granted.

The above words being sworn evidence by the applicants, and same not contradicted by respondent no doubts that, same will be adhered to.

Having satisfied that, offence is bailable and this court has jurisdiction to grant bail, same is granted to the applicant upon fulfillment of the following conditions:

1. applicant to sign bound of Ten millions with other two sureties who shall excute bond of the same amount provided one surety shall be government employee within Nachingwea District.
2. The applicant to surrender his passport and any other travelling documents if any, to the District Court Magistrate of Nachingwea.
3. The applicant should not leave jurisdiction of Lindi Region without written permission from the Nachingwea District Court Magistrate.
4. Applicant is mandatorily required to appear in court at any time when he is required for hearing, until final determination of the criminal case facing him.
5. Verification of sureties and bond documents, shall be executed by the District Court Magistrate of Nachingwea.
6. District Registrar to ensure compliance.




Z.G. Muruke

Judge

31/03/2022

Ruling delivered in the presence of Kauli George Makasi Senior State Attorney for the Respondent and applicant in person.




Z.G. Muruke

Judge

31/03/2022