

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

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 40388 OF 2023**  
(Arising from Criminal Appeal No. 38789 of 2023 in the High Court of  
Tanzania, Dar es salaam District Registry)

**MELCHIORY BLASIUS KAMATA..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

*Date of last order: 22<sup>nd</sup> January 2024*

*Date of Ruling: 29<sup>th</sup> January 2024*

**MTEMBWA, J.:**

Under ***section 368 (1) (a) (i) of the Criminal Procedure Act, Cap 20 R.E 2022***, the Applicant is seeking for bail pending hearing of **Criminal Appeal No. 38789 of 2023** in the High Court of Tanzania at Dar es salaam District Registry. The same was brought under a Certificate of Urgency and is supported by an affidavit of the Applicant.

To appreciate the facts, I find it opt, albeit briefly, to narrate the background of this Application. Together with one Agnes Blasius

Kamata, the Applicant was charged with, among others, the offence of Forgery contrary to **sections 333, 335 (d) (i) and 337 of the Penal Code, Cap 16 RE 2019**. Having evaluated the evidence adduced during hearing, the trial Court sentenced the Applicant to serve three years imprisonment. Dissatisfied, the Applicant, together with his co-accused, appealed to this Court in **Criminal Appeal No. 38789 of 2023**. While the appeal remained pending, the Applicant applied before this Court for bail consideration pending hearing of the said appeal.

When this matter was called up for hearing, **Ms. Solome Matunga**, the learned State Attorney appeared for the Respondent Republic while the Applicant opted to enjoy the service of **Mr. Nafikile Mwamboma**, the learned counsel. The learned state attorney, when prompted, informed this court of the Republic's intention to resist this Application.

Stagging the floor in support of the Application, Mr. Mwamboma submitted that this application has been brought for bail consideration pending hearing of Criminal Appeal No. 38789 of 2023 which is pending before this Court. He submitted further that this Court has discretionary mandate to release the Applicant on bail pending the final

determination of the said Appeal. However, that, the discretion cannot be exercised unless there are reasonable grounds offered warranting the grant. He cited the cases of ***Najibu Mansoor Bajwahuka Vs. Republic, Misc. Criminal Application No. 103 of 2022, High Court of Tanzania at Dar es Salaam*** and ***Soud Khalfan Vs. Republic, Misc. Criminal Application No. 17 of 2016, High Court of Tanzania at Shinyanga*** where, in all cases, bail pending appeal was granted, he added.

To add, Mr. Mwamboma reminded this Court of the following criteria for granting bail pending appeal in view of the cited case of ***Najibu Mansoor Bajwahuka (supra)*** thus;

1. *That the applicant must have filed the Appeal against the conviction.*
2. *The appeal is not frivolous (meaning has a chance of succeeding).*
3. *That there is a firm undertaking to secure the attendance of the Applicant when the Appeal comes for hearing.*
4. *The offence to which the person has been convicted is bailable and the person has been on bail before conviction.*
5. *That keeping him in custody as he appeals is not public interest, and,*
6. *Existence of any special individual circumstances relating to physical and or mental health or harm to the applicant or his family if he is not released on bail.*

Mr. Mwamboma explained further that the Applicant has already filed an appeal which is pending before this Court and that even if bail is granted, he will be available when the same is called up for hearing. He added further that the Applicant was previously bailed out at the trial Court and he never jumped the bail. On whether there are individual special circumstances warranting the grant, Mr. Mwamboma submitted that the Applicant is facing serious health problems and that it is necessary that he be released on bail.

In addition, Mr. Mwamboma cited the case of ***Murtaza Mohamed Raza Virani Vs. Mehboob Hassanali Versi, Civil application No. 448/01 of 2020, Court of Appeal of Tanzania at Dar es Salaam*** where the Court observed that sickness is not a shared experience except for children who are yet to express their feelings. That it is the Applicant who says he is sick and produces medical chit. In this case, in the end, the Application for extension of time was granted on the ground of sickness, he finally alluded.

Lastly, Mr. Mwamboma attacked the Counter affidavit filed by the Republic and in that he said, the facts which have been deponed by the Applicant have not been controverted by the Republic. He

added that, the denials, so to say, are aversive. He cited the case of ***East African Cables (T) Limited Vs. Spencon Services Limited, Misc. application case No. 61 of 2016, High Court of Tanzania (Commercial Division) at Dar es Salaam*** where it was observed that putting the applicant to strict prove without giving the other side of the story is tantamount to admission. He then implored this Court to grant the Application.

In reply, Ms. Matunga vigorously resisted the Application and submitted further that the denials in the Courter Affidavit were not aversive as alluded by Mr. Mwamboma. She discredited the cited case of ***East African Cables (T) Limited (supra)*** on the ground that the same is not binding to this Court. She insisted further that the reasons advanced in the Applicant's affidavit are not sufficient warranting the grant of bail pending appeal.

Ms. Matunga submitted in addition that granting bail pending appeal is not a matter of right but of privilege. Submitting on the cited cases of ***Najibu Mansoor Bajwahuka (supra)*** and that of ***Soud Khalfan (supra)***, Ms. Matunga added that the Applicant was released on bail pending trial because he was yet to be convicted, and of course, on the basis of the principle of presumption of innocence,

he was so entitled as a matter of right. She added that, since the Applicant has already been convicted and sentenced, such principle is inapplicable as of now.

As to whether the Application is meritorious, Ms. Matunga submitted that the Applicant has not provided cogent reasons warranting the grant of bail pending appeal. She added further that the Applicant was supposed to bring the recent Medical Report showing his current ill health deteriorating condition. That the attached medical report (Annexure MBK-5 to the Affidavit) was prepared on 18<sup>th</sup> July 2023 and to date, approximately, six months have lapsed. She added, in the circumstances, his ill health condition might have changed due to lapse of time. After low, there has been no materials to rely on from prison officer showing that the prison authority cannot best handle the situation as of now, she added. It was her submissions that the reasons so advanced do not amount to unusual and or exceptional circumstances.

Ms. Matunga distinguished the cited case of ***Najibu (supra)*** and added further that the circumstances are not the same. She said, in that case, the Applicant was diabetic unlike in the instant case where the Applicant is suffering from severe lower back pain

associated with lower limb pain caused by severe muscles spasm and the effect is that he will be unable to carry or lift heavy objects or stand/sit for long period of time. She added that even the proscribed medicines can easily be obtained while in prison otherwise, this Court could have been informed by the prison officer in charge of such inability, if any.

Ms. Matunga further distinguished the cited case of **Murtaza Mohamed Raza Virani (supra)** and added further that the same is inapplicable in the circumstances. That, in that case, the Applicant applied for extension of time basing on the ground of sickness while in the instant Application, the Applicant has been already been convicted.

In the final note, Ms. Matunga cited the case of **Amon Mlotwa Mwalupindi Vs. DPP, Criminal Application No. 09/06 of 2020, Court of Appeal of Tanzania at Mbeya** where it was observed that, the court will be reluctant to endorse the argument that ill health constitutes the exceptional or unusual reason warranting the grant of bail pending appeal where there is no current and valid medical report or an affidavit of the prison officer showing deterioration of the health of the Applicant. She was of the views that

if the Applicant is granted bail pending appeal, the court will open a new Pandora's box where every convict will be coming to court seeking for bail pending appeal. She lastly beseeched this Court to dismiss the Application.

Rejoining, Mr. Mwamboma submitted that the filed Counter Affidavit by the Republic is priceless in the eyes of law as the denials are typically aversive. He added that ill health is not the only reason advanced by the Applicant and further attacked the learned state attorney for failure to see other reasons justifying the grant of bail pending appeal. He added that the submissions by the learned state attorney are irrelevant as the same ought to have been featuring in the Counter affidavit. Otherwise, they are considered to be submissions from the bar because factual issues must be stated in the Affidavit.

Mr. Mwamboma lastly, distinguished the cited case of **Amon Mulotwa Mwalupindi (supra)** and submitted further that, in that case, the disputed facts were traceable in the Counter affidavit unlike the instant one where the denials are aversive. He added further that, irrespective of whether there is a current medical report or not, it is



the Applicant who feels the pain and as such, he is entitled to be believed. He insisted that the Application has merits.

Indeed, as properly cited by Mr. Mwamboma, **section 368 (1) (a) (i) of the Criminal Procedure Act (supra)** empowers this Court to grant bail pending hearing of the Appeal. However, as alluded by Ms. Matunga which Mr. Mwamboma finds to be the correct position of the law, granting bail pending trial is a matter of right prefaced on the principle of presumption of innocence as opposed to granting bail pending appeal which is typically a matter privilege (see also **Lawrence Mateso V. R (1996) TLR 118**). Even principles applicable between the two are not the same. In **Amon Mulotwa Mwalupindi (supra)** the Court noted;

*We have deliberately brought to the fore the above cited decisions to stress the point that considerations for the grant of bail pending appeal are quite different from those applicable to bail pending trial. In applications for the grant of bail pending trial, 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.*

*(emphasize added)*

In some instances, earlier, bail pending appeal was grantable on the pretext that there are chances of success on appeal. In view of decision of the Court of Appeal in ***the Registered Trustees of Kanisa Pentekoste Mbeya Vs. Lamson Sikazwe & 4 others, Civil Application No. 191/06 of 2019***, such reason is no longer capable of serving the day.

Painstakingly, I went through the Applicant's Affidavit and noted that the same is divided into three parts. The first part of the Affidavit presents what transpired before this Application was filed. The second part presents the Applicant's ground or reason warranting the grant of bail pending appeal. And lastly, the undertakings or commitments should bail be granted.

With respect to Mr. Mwamboma, the Affidavit contains only one ground, that is, ill health of the Applicant. Even the Certificate of extreme urgency taken by him supports such assertion. The fact that the Applicant was released on bail pending trial or he is ready to appear when the appeal is called up for hearing, in my view, are not justifiable reasons and in fact, not unusual or exceptional in nature warranting the grant of this Application. That said, I will therefore consider only whether ill health of the Applicant constitutes unusual

and exceptional circumstances warranting the grant of bail pending appeal given the available materials on records.

In his Affidavit, the Applicant deponed that he has a history of suffering from **severe lower back pain** associated with **lower limb pain**. He deponed further that lumber sacral Xray was done and revealed loss of lumber lordosis due to severe muscle spasm. As such, that, he is supposed to be in medication, attend orthopedic clinic monthly and physiotherapy sessions. To support, he attached a Medical Report (Annexure MBK-5) dated and or prepared on 18<sup>th</sup> July 2023. By citing the cases of ***Najibu Mansoor Bajwahuka (supra)*** and ***Soud Khalfan (supra)***, Mr. Mwamboma implored this Court to grant this Application. On her part, by citing the case of ***Amon Mlotwa Mwalupindi (supra)***, Ms. Matunga did not find purchase of the Application. She insisted that the same is wanting of merit.

Luckly, the learned counsels are both alive to the applicable principle that bail pending appeal is grantable upon establishing or advancing exceptional and unusual circumstances. If I may add, the reasons or grounds must be supported by reliable materials on records, short of which, the application will not be granted. The reason behind is that, at this stage, the Applicant is a convict serving

a specific period of time in prison. In order not to go against the public policy and proper administration of criminal justice, granting bail pending appeal should be a last recourse a court may take, of course, upon advancing special, exceptional and unusual circumstances.

I have carefully passed through the Medical Report dated 18<sup>th</sup> July 2023 attached to the Affidavit and noted that the same was issued five months ago. I expected to see current report on the Applicant's health to appreciate if the prison authority can't best handle the situation currently to enable this Court to assess whether or not to grant this Application. As submitted by Ms. Matunga, the Medical Report was prepared in July 2023, even before he was convicted and sentenced on **5<sup>th</sup> October 2023**. Even after he was so convicted and sentenced, the Applicant did not opt promptly to apply for bail consideration. It is on records that the Appeal was filed on **13<sup>th</sup> November 2023**. In such circumstances, I agree with the learned state attorney that, perhaps, the situation might have changed.

In addition to the foregoing, one also would have expected to see the affidavit of the prison officer, be it a doctor or otherwise or

prison officer closely taking care of the Applicant as the case may be, certifying deterioration or unusual condition of the Applicant to enable this Court to consider the situation. Such materials to rely on were necessary in the circumstances. It's very unfortunate that I am not prepared to believe that there are no medical services at the prison, and if so, that would have been supported by materials on records. With respect I cannot venture to unknown situation without reliable materials. In ***Amon Mulotwa Mwalupindi (supra)***, the Court noted;

*As rightly submitted by the learned State Attorney, old age or ill health alone without any evidence to show how these will impact on the applicant's continued incarceration as a prisoner awaiting determination of his appeal cannot be a good ground for exercising the Court's discretion under rule 11(2) of the Rules. **Put it differently, the applicant has not laid before us any material showing that his old age and ill health are such unusual and exceptional circumstances warranting the grant of bail pending appeal.***

*(emphasis added)*

In the case of ***Hassanali Walji Vs. Republic (1968) HCD 174***, the Applicant applied for bail pending appeal offering special circumstances that he is suffering from urinary affliction requiring long treatment and a possibility of hospitalization. However, the prison medical officer certified that he could be treated and hospitalized, if

necessary, while in custody. Refusing the Application, Hon. George CJ (as he then was) had this to say;

*Illness, in this case is not a "special circumstance" because of the availability of facilities for accused treatment while in custody.*

In his Affidavit, the applicant deponed that he is supposed to be in medication, attend orthopedic clinic monthly and physiotherapy sessions. As said before, there is no certification of any of the officers from prison authority certifying such ability or inability. In such situation, I agree with Ms. Matunga that in the absence of materials to rely on, this court will continue to believe and trust that prison authority may handle the Applicant's situation as of now while he is in custody unless proved otherwise.

While down to the end, the cited case of ***Murtaza Mohamed Raza Virani (supra)*** was cited out of context. While I agree that sickness is not a shared experience and that it is a person who feels the pain except for children who are yet to express their feelings, in this case, the Applicant was highly demanded to supply materials for the Court to rely on. It may be a ground that need no detailed explanation or materials when a person applies for extension of time but not bail pending appeal like the instant Application.

In fine, without a valid and current Medical Report to support the Applicant's averments or an affidavit from prison officer, prison health department or any person taking care of the Applicant as of now, showing deterioration or otherwise of the health of the applicant, and that the situation can not be best handled while the Applicant is in prison, I am reluctant to endorse the argument that ill health constitutes special, exceptional or unusual circumstances to warrant the exercise of my discretion to grant bail pending appeal in the instant Application. That said, this Application is hereby refused.

I order accordingly.

Right of appeal explained.

**DATED at DAR ES SALAAM this 29<sup>th</sup> January, 2024.**



A handwritten signature in black ink, appearing to read "H.S. Mtembwa", is written over the seal and extends to the right.

**H.S. MTEMBWA**

**JUDGE**